

INTERNATIONAL COURT OF JUSTICE

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

**DEMOCRATIC REPUBLIC OF THE CONGO
V.
UGANDA**

**REJOINDER
SUBMITTED BY
THE REPUBLIC OF UGANDA**

VOLUME I

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INTRODUCTION

1. This *Rejoinder* is being filed pursuant to the Order made by the Court on 7 November 2002 fixing 6 December 2002 as the time-limit for the filing of the *Rejoinder* of the Republic of Uganda.
2. At the outset, Uganda is pleased to inform the Court that on 6 September 2002, Uganda and the Democratic Republic of the Congo (“DRC”) successfully concluded a comprehensive peace agreement to end the conflict between the two States.
3. Executed in Luanda, Angola by the Presidents of Uganda and the DRC, the agreement recognises the seriousness and continuing nature of the threats to Uganda’s security highlighted in the *Counter-Memorial*, and includes specific commitments by the DRC to address those threats. In particular, the DRC committed herself “to refrain from all types of military and logistical support including the provision of bases and sanctuary to the armed groups” that have carried out armed attacks in and against Uganda from Congolese territory since 1994. (*Rejoinder* (“UR”) Annex 84, Art. 2, para. 2.) The DRC further agreed that “Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda’s security, including training and coordinated patrol of the common border.” (*Ibid.*, Art. 1, para. 4.)
4. For her part, Uganda agreed at Luanda to withdraw from the DRC all Ugandan troops, except those expressly authorised by the DRC to remain “on the slopes of Mount Ruwenzori.” Since the agreement was reached, Uganda has in fact fulfilled her obligations thereunder and withdrawn her troops from the DRC. The only remaining Ugandan troops are those expressly authorised to remain under the Luanda Agreement “until the Parties put in place mechanisms guaranteeing Uganda’s security.”
5. With the DRC’s express commitment to address Uganda’s security concerns seriously and in coordination with Uganda, and with the consequent withdrawal of Ugandan troops

from the DRC, this *Rejoinder* is being submitted amidst vastly improved diplomatic relations between Uganda and the DRC.

6. Uganda is also pleased to note that, in addition to an improvement in bilateral relations, significant progress has been made in bringing an end to the internal conflict in the DRC. As contemplated by the Lusaka Agreement of July 1999, the DRC Government and three Congolese rebel organisations have recently participated in an “open national dialogue,” and reached an agreement in principle on a “new political dispensation” for the Congo. Under the current formula, the present Congolese Government and the rebels would share power in a provisional government that would hold office until the convening of national elections. The leaders of the three rebel organisations would each become a Vice President in the provisional government; current DRC President Joseph Kabila would continue in his office until elections are held.

7. As a result of these positive developments between Uganda and the DRC, and between the DRC Government and Congolese rebel organisations, there is far greater cause for optimism on all fronts now than at the time Uganda submitted her *Counter-Memorial* in April 2001, or when the DRC submitted her *Reply* on 29 May 2002. Indeed, the current environment allows Uganda to look forward to a peaceful resolution of the conflict in the DRC, to the maintenance of security along the common border, and to a new and constructive working relationship with the Government of the DRC, in full expectation that the recent warming of relations between the two States will prove permanent.

8. Nonetheless, for the time being at least, the DRC continues to pursue her claims against Uganda in the Court. Uganda thus has no option but to respond in full to the DRC’s *Reply*.

9. Before addressing the numerous factual and legal errors and omissions that plague the *Reply*, Uganda wishes to call the Court’s attention to three fundamental flaws that infect the DRC’s latest pleading from beginning to end.

10. First, whereas the DRC’s *Memorial* was some 148 pages of text (excluding Annexes), her *Reply* spans a full 400 pages. Her second submission is thus more than 250% as long as her first, and is expressly intended not as a supplement to her *Memorial*, but as a replacement for it. At paragraph 2.05 of the *Reply*, the DRC states: “*Dans ces circonstances, il faut préciser que c’est évidemment la présente réplique (et non le mémoire, et a fortiori la requête) qui constitue désormais l’instrument de référence en ce qui concerne l’exposé de la version des faits qui est défendue par la RDC dans le cadre de cette instance.*”¹ Thus, the DRC purports to discard both her *Memorial* and her *Application*, and to restate her case *ab initio*.

11. Whether or not this constitutes a technical violation of Article 49, paragraph 3 of the Rules of Court is, of course, for the Court to decide. At the very least, however, the DRC has clearly violated the spirit of the Rule, which states that replies shall be limited to “bringing out the issues that still divide [the parties].” For her part, Uganda will confine this *Rejoinder* to genuinely addressing only the issues that authentically still divide the Parties.

12. Second, like the DRC’s *Memorial*, her *Reply* relies for its “facts” almost exclusively on third-hand reports from newspaper and magazine articles, rather than official statements, contemporaneous documents or first-hand accounts by participants or eyewitnesses. Rarely, if ever, are the original sources of any of the excerpted statements from the DRC’s multitude of periodical articles identified. There is thus no way for the Court to assess their objectivity or reliability. To the contrary, as further discussed in Chapter I of this *Rejoinder*, in most cases the reports themselves make clear that they are based on nothing more than multiple hearsay, opinion, rumor or

¹ “In these circumstances, we must state that it is evidently the present *Reply* (and not the *Memorial*, and *a fortiori* the *Application*) that constitutes from now on the document of reference as far as the presentation of facts by the DRC in the framework of this case is concerned.”

(Except where otherwise noted, all English translations included in this *Rejoinder* are unofficial translations only. At the time the *Rejoinder* was prepared, the Court’s official translation of the *Reply* was not yet available.)

gossip. While the Court has previously ruled that such materials *may* be admissible for certain purposes, the DRC's reliance on periodical articles, books by journalists and reports by partisan non-governmental organisations to establish each and every component of her case stresses the Court's evidentiary flexibility to the breaking point.

13. In contrast, this *Rejoinder*, like the *Counter-Memorial*, is based primarily on first-hand evidence from direct participants and other eyewitnesses, much of it taken from sworn testimony offered in open court and subject to cross-examination, together with original source documentation and official statements. Uganda's evidence, unlike the DRC's, meets the standards that must prevail in a court of law.

14. Third, the *Reply* suffers from an incurable tendency to conflate Rwanda and Uganda, and to impute automatically all actions taken (or allegedly taken) by the former State to the latter, as if the two States were a single entity. Thus, there are innumerable references throughout the *Reply* to the alleged actions of "Rwanda and Uganda" when, in fact, the underlying evidence shows that the actions were taken only by Rwanda, if at all. This is not an innocent case of mistaken identity, but a deliberate tactical ploy by the authors of the *Reply* to mask the fact that they have no proof to support their allegations against Uganda. Simultaneously, it is an admission that unless they can show Uganda's "guilt by association" with Rwanda, they have no case.

15. In fact, they have no case. Rwanda and Uganda are distinct States that have divergent interests in the DRC, and whose policies toward the DRC have conflicted more often than they have coincided. Whereas Rwanda led the 1996-97 war that ousted former Congolese President Mobutu Sese Seko and installed Laurent Kabila as President of the DRC, Uganda chose not to commit troops. Whereas Rwanda established and controlled the Congolese Army under President Kabila, Uganda had no such involvement. Whereas Rwanda sent her troops into the DRC in August 1998 in support of Congolese rebels seeking to overthrow President Kabila, Uganda did not. Whereas Rwanda fought all the way across the DRC in order to seize

Kinshasa and bring about “regime change,” this was never Uganda’s objective. Rather, Uganda’s sole objective in the DRC is and always has been her own self-defence. To this end, Uganda sent her troops into the DRC only to drive out hostile forces, especially troops from Sudan, which had occupied airfields and other strategic locations in eastern and northeastern Congo, and were preparing to attack Uganda both directly and through stepped-up support for anti-Uganda insurgents.

16. Thus, whatever the merits of the DRC’s case against Rwanda, there are none against Uganda, whose limited intervention in the DRC was motivated solely by a grievous and imminent threat to her security, and by her resulting necessity to act in self-defence.

17. The most remarkable feature of the *Reply* is that, beneath all the sound and fury of its rhetorical tirade against Uganda, it actually *admits* all of the facts necessary to support Uganda’s contention that her military intervention in the DRC was a lawful exercise of her right to self-defence. As shown in Chapter II of this *Rejoinder*, the DRC has now admitted, either expressly or by failure to deny: (i) that anti-Uganda insurgent groups based in eastern Congo carried out armed attacks in and against Uganda continuously since 1994, that the problem “exploded” in 1997, and that by 1998 it became a serious threat to Uganda’s security; (ii) that between May and August 1998, President Kabila of the DRC formed a military alliance with the anti-Uganda insurgents and with Sudan, which, at the time the alliance was made, was already the author of an aggressive war against Uganda (with whom Sudan shares a long common border); and (iii) that pursuant to this alliance, the DRC allowed Sudan to send thousands of its own troops into Congo, to occupy strategic locations and airfields in eastern and northeastern Congo within striking distance of Uganda, to step up military and logistical support for the anti-Uganda insurgents, and to attack Ugandan forces along the Uganda-DRC border. None of these facts are now in dispute.

18. Furthermore, the *Reply* makes clear that the DRC herself consistently and repeatedly acknowledged the gravity of Uganda’s security concerns. As admitted in the *Reply* (as well

as in the *Memorial*), because of the security threat posed by anti-Uganda insurgents, the DRC Government authorised Uganda to station three battalions of her own troops in eastern Congo beginning in 1997. While the DRC now claims that her authorisation was revoked in August 1998, she admits that by then the security threat to Uganda from these insurgents was greater than ever.

19. The DRC again recognised that the insurgents posed a serious threat to Uganda in the Lusaka Agreement of July 1999. In that Agreement, the DRC agreed that the anti-Uganda insurgents in her territory would be disarmed, demobilised, repatriated and rehabilitated *before* Ugandan troops would be withdrawn. And, as indicated above, as recently as the Luanda Agreement on 6 September 2002, the DRC again acknowledged the legitimacy and the seriousness of Uganda's security concerns, pledged once again to refrain from allowing anti-Uganda insurgents to maintain bases in Congolese territory, and agreed to allow Ugandan troops to remain in the DRC "until the Parties put in place mechanisms guaranteeing Uganda's security...."

20. Thus, the *Reply* does not challenge Uganda's showing that, as of mid-September 1998, the security threat posed by the presence in eastern Congo of hostile Sudanese forces and anti-Uganda insurgents, in both cases allied to the DRC Government, was sufficiently severe and imminent to warrant Uganda's exercise of her inherent right of self-defence. Rather, the main thrust of the *Reply* is to accuse Uganda of launching her military intervention in the DRC not in mid-September 1998 as Uganda contends, but *at the beginning of August*, allegedly before the conditions existed to justify such action as lawful self-defence. This case boils down, therefore, to a dispute over timing: When did Uganda send her troops into the DRC?

21. As demonstrated in the *Counter-Memorial* and as reaffirmed in Chapter II of this *Rejoinder*, Uganda's decision to send troops into the DRC to confront the threat posed by Sudan and the anti-Uganda insurgents was made on 11 September 1998, and was first implemented between 16 and 20 September.

All of the evidence confirms this. In the *Reply*, the DRC concocts a series of allegations that Ugandan troops “invaded” the DRC a month earlier, before the Sudanese threat had fully materialised, in a strained effort to show that Uganda was an “aggressor” instead of a victim acting in self-defence. Thus, the *Reply* accuses Uganda of participating in attacks on Kitona and Kindu in early August, and in an attempted coup d’etat against President Kabila. However, as demonstrated at length in Chapter II below, at best the evidence shows only that Rwanda carried out these actions, in collaboration with Congolese rebel forces. There is no credible evidence that Uganda participated in any of these events. In fact, she did not.

22. Unable to show that Uganda intervened militarily in the DRC before mid-September 1998, the *Reply* thus fails to defeat Uganda’s claim of self-defence. Chapter III of this *Rejoinder* demonstrates that Uganda has fully satisfied the legal requirements to invoke her inherent right to self-defence as a justification for her intervention into the DRC. The DRC’s arguments to the contrary are unavailing.

23. The DRC’s hypothesis that Uganda was somehow motivated to intervene in the DRC by an alleged desire to exploit her natural riches is likewise belied by the evidence. Contrary to the DRC’s repeated assertions, Ugandan forces did not participate in the Rwanda-led war to overthrow former President Mobutu. Consequently, there could have been no desire to “return” to take advantage of the DRC’s purported riches, as the *Reply* suggests. To the contrary, Uganda’s sole purpose in sending her forces into the DRC was to defend herself against serious threats to her security posed by Sudan and the other hostile forces aligned against her.

24. Moreover, as fully set forth in Chapter IV of this *Rejoinder*, the evidence shows that Ugandan forces did not engage in the illegal exploitation of resources in the DRC. Ugandan troops were at all times under strict orders from the highest governmental and military authorities to refrain from all business or commercial activities while in the DRC, and these orders were enforced and obeyed.

25. The DRC's contrary case relies almost entirely on a now-discredited report by a panel of "experts" whose credibility has been challenged by many States, including, ironically, the DRC herself. Among other deficiencies discussed in Chapter IV, the so-called experts refused to identify the sources of the "evidence" on which their findings were purportedly based, refused to confront accused governments or individuals with the "evidence" against them or otherwise to give them a chance to defend themselves or explain their actions, and failed to interview knowledgeable witnesses or review relevant documents that might have contradicted their conclusions. For these and other reasons, the report falls so far short of the legal standards for imputing responsibility to a State that it cannot possibly support the DRC's "illegal exploitation" allegations against Uganda.

26. Equally unsupportable are the DRC's claims that Ugandan forces systematically violated the human rights of Congolese nationals. As shown in Chapter V of this *Rejoinder*, the DRC's argument proceeds from the faulty premise that Uganda maintained a military "occupation" of Congolese territory, and is therefore "responsible" for human rights abuses committed therein without the necessity of further proof as to the identities of the actual perpetrators. This, of course, is nothing but an artful attempt to excuse the DRC's inability to demonstrate direct responsibility for specific abuses that might (or might not) have occurred. In any event, the attempt fails because, *inter alia*, Uganda never "occupied" any Congolese territory. Her relatively small contingent of troops was dispersed across an area roughly the size of Germany, and concentrated almost exclusively in the border region and in a few key towns and strategic locations, especially airfields. Moreover, Ugandan troops never sought to administer the areas in which they operated; local administration in all cases was performed by existing Congolese municipal authorities, or by the Congolese rebel organisation that controlled the particular area. The DRC's occasional efforts to attach direct responsibility to Ugandan troops for specific human rights abuses fail because, as shown in Chapter V, there is no first-hand or credible evidence in any of these cases on which to impute liability to Uganda.

27. Thus, the only valid claims before the Court are the ones brought by Uganda as counter-claims against the DRC. With respect to those, the evidence presented in the *Counter-Memorial*, which Uganda supplements in Chapter VI of this *Rejoinder*, shows conclusively: (1) that the DRC bears international legal responsibility for cross-border attacks by anti-Uganda insurgents operating from Congolese territory that Uganda has been forced to endure since 1994; and (2) that the DRC is equally responsible for the Congolese Army's unprecedented assault on and seizure of the Ugandan Embassy in Kinshasa, as well as its uncivilised attacks on Ugandan diplomats and nationals, who were beaten and humiliated, and had their property stolen, by agents of the DRC Government. As shown in Chapter VI, the DRC's legal and factual arguments directed at undermining these claims are entirely without substance.

28. In sum, the DRC has failed to show that Uganda's military intervention in the DRC was anything other than Uganda's exercise of its inherent right to self-defence against grievous and imminent threats to her security -- threats that the DRC herself has acknowledged on repeated occasions. Nor has the DRC met her burden of proving that the conduct of Ugandan forces in the DRC fell short of any international norms. All of these allegations are refuted by an objective and impartial analysis of the facts, as demonstrated in the *Counter-Memorial* and reaffirmed in this *Rejoinder*. Indeed, the evidence shows that the only State that has been a victim of aggression is Uganda, and the State that is responsible for that aggression is the DRC. Accordingly, as fully demonstrated in Chapters I through VI herein, the DRC's claims against Uganda should be rejected, and Uganda's counter-claims should be sustained.

CHAPTER I

THE PERSISTENT ANOMALIES IN THE *REPLY* CONCERNING MATTERS OF PROCEDURE AND EVIDENCE

29. In Chapter I of the *Reply*, the DRC raises a wide range of issues which are, in principle at least, part of a response to the questions of evidence and procedure examined in the *Counter-Memorial*. The DRC insists on rehearsing material which will be of little or no assistance to the Court, but a process of rebuttal is nonetheless called for. The issues presented in Chapter I of the *Reply* will be considered one by one.

A. The Continuing Confusion Relating To Liability (Merits) And Quantum (Compensation)

30. The Government of Uganda is saddened to note that the legal confusion redolent of the *Memorial* of the DRC persists. As Uganda pointed out in the *Counter-Memorial*, there is a fundamental confusion in the *Memorial* between the proof of violations of legal obligations and the issue of quantum of damage (or compensation). (*Counter-Memorial* (“UCM”), paras. 170-83.) Unfortunately, this confusion still persists. (*Reply* (“DRCR”), paras. 1.02-1.03, 1.06-1.14.)

31. Uganda has no interest in maintaining this unproductive exchange, but it is necessary to affirm that the confusion persists. Thus, it is not true, as the DRC alleges, that Uganda insists that all the consequent damage has to be proved at the liability stage of the proceedings. (DRCR, para. 1.09.) Moreover, nothing in the *Nicaragua* case indicates otherwise. The basic point is that, at the phase relating to reparation, the process of reparation must be confined to violations of obligations which form part of the *res judicata*. (I.C.J. Reports, 1986, p. 142, para. 284, *quoted in* Rosenne, *Law and Procedure*, Vol. III, pp. 1246-47; *cf.* DRCR, para. 1.10.) Moreover, the DRC appears to believe that issues of causation

can be left over to the compensation phase, which is plainly wrong. (DRCCR, paras. 1.11-1.12.)

32. In the same section of the *Reply*, there is a curious assertion to the effect that it is not necessary for the DRC to prove the specificities of the alleged violations. (DRCCR, paras. 1.15-1.21.) The exposition is difficult to follow and Uganda reserves her position. However, the assertion appears to form part of a recrudescence of the procedural confusions upon which the *Memorial* was based. Central to these confusions was the failure to understand the relationship between the proof of violations of legal obligations and the separate task of establishing the quantum of damage. (UCM, paras. 118-22, 170-83.) In this general context, Uganda does not consider that the decision of the Court in the *Nicaragua* case (Merits) provides any assistance to the DRC. (DRCCR, para. 1.19.) This response would be justified even if the DRC had done more than simply refer to a paragraph in the *Dispositif* as the entire basis of the argument.

B. Uganda Reaffirms Her Position That The Court Lacks Competence To Deal With The Events In Kisangani In June 2000

33. This question of competence was examined in some detail in the *Counter-Memorial*, in Chapter XV. (UCM, paras. 264-87.) The DRC now seeks to challenge the conclusions presented in the *Counter-Memorial*. (DRCCR, paras. 1.23-1.31.) This challenge is based upon some very weak reasoning.

34. First, the DRC asserts that, apart from this argument relating to Rwanda, Uganda has not otherwise challenged the jurisdiction of the Court. That is so; at the appropriate stage Uganda decided not to present any preliminary objections. (DRCCR, para. 1.25.) Nothing follows from this; the proceedings are, of course, now at the Merits Phase.

35. Second, the DRC asserts that the issue has been raised in earlier pleadings. This assertion does not call for a response.

36. Third, the DRC relies on the Order on Interim Measures dated 1 July 2000. But, in accordance with the usual practice, the Court stated that:

Whereas a decision in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the merits themselves, and leaves unaffected the right of the Governments of the Congo and of Uganda to submit arguments in respect of those questions

(Order, para. 46.)

37. Finally, the DRC seeks to distinguish the available case law on the facts. In this respect Uganda maintains the analysis of the jurisprudence presented in Chapter XV of the *Counter-Memorial*. (UCM, paras. 2.72-2.78.)

38. The DRC relies, in particular, on the decision of the Court in the case of *Certain Phosphate Lands in Nauru*. (ICJ Reports 1992, pp. 261-62, para. 55.) On the facts of that case, the Court could decide on Nauru's claims against Australia in the absence of the United Kingdom and New Zealand, and without their responsibility being determined. In relation to the conflict in Kisangani, it would be legally impossible to determine the responsibility of one of the factors in the absence of the other actor. In any event, the *Nauru* decision was concerned with jurisdiction. As the Court observed:

The Court must however emphasise that its ruling in the present Judgment on this objection of Australia does not in any way prejudice the merits. The present Judgment does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the

characteristics of the Mandate and Trusteeship Systems outlined above and, in particular, the special role played by Australia in the administration of the Territory. These questions are to be dealt with at the merits stage.

(I.C.J. Reports, 1992, p. 262, para. 56.)

C. The Court's Finding On The Third Counter-Claim

39. The DRC relies upon the passage of the Interim Measures Order of 12 December 2001 in which the Court refuses to accept the third Counter-Claim of Uganda in order to assert that:

L'Ouganda ne saurait par conséquent justifier son action militaire en invoquant certaines dispositions des accords de Lusaka, tout comme d'ailleurs, dans un autre context, la RDC (ou une autre partie) ne saurait justifier un éventuel non respect de ces accords en invoquant la responsabilité de telle autre partie dans le déclenchement du conflit. L'ordonnance de la Cour confirme bien que les accords de paix visent spécifiquement les modes de résolution du conflit, mais n'ont certainement pas pour objet de se prononcer sur la responsabilité de telle ou telle autre partie dans le déclenchement ou dans la poursuite du conflit.²

² "Consequently, Uganda cannot justify its military action by invoking certain provisions of the Lusaka Agreement, as indeed, in another context, the DRC (or another party) cannot justify a subsequent failure to respect this agreement by invoking the responsibility of another party for sparking off the conflict. The Court's ruling confirms that the peace agreement specifically deals with *ways of resolving the conflict*, and certainly do not aim to establish the *responsibility of such or such a party in sparking off the conflict or its responsibility in the course of the conflict.*"

(DRCR, para. 1.41; emphasis in original.)

40. The relevant passages from the Order of the Court reads as follows:

42. Whereas, in respect of Uganda's third counter-claim (alleged violations by the Congo of the Lusaka Agreement), it is to be observed from the Parties' submissions that Uganda's claim concerns quite specific facts; whereas that claim refers to the Congolese national dialogue, to the deployment of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and to the disarmament and demobilization of armed groups; whereas these questions, which relate to *methods of solving the conflict* in the region agreed at multilateral level in a ceasefire accord having received the "strong support" of the United Nations Security Council (resolutions 1291 (2000) and 1304 (2000)), concern facts of a different nature from those relied on in the Congo's claims, which relate to acts for which Uganda was allegedly responsible *during that conflict*; whereas the Parties' respective claims do not therefore form part of the same factual complex; and whereas the Congo seeks to establish Uganda's responsibility based on the violation of the rules mentioned in paragraph 38 above, whilst Uganda seeks to establish the Congo's responsibility based on the violation of specific provisions of the Lusaka Agreement; whereas the Parties are thus not pursuing the same legal aims;

43. Whereas the Court considers that the third counter-claim submitted by Uganda is therefore not directly connected with the subject-matter of the Congo's claims; ...

(Order, paras. 42-43.)

41. These passages are concerned with the application of the criteria set forth in Article 80 of the Rules of Court, this being the exclusive focus of the inquiry, as paragraphs 35 and 36 of the Order indicate. The Court is applying the criterion of “direct connection” and this is clear also from the conclusion in paragraph 43.

42. These passages provide no basis whatsoever for the suppositions generated by the DRC. The Court is not seeking to suggest that the Lusaka Agreement has no legal relevance in these proceedings. What the Court does is to demonstrate that “the Parties are thus not pursuing the same legal aims.”

D. The Alleged Admissions By Uganda

43. In a section of Chapter 1 of the *Reply*, the DRC rehearses a number of so-called admissions by Uganda, and, in this context, suggests that various divergences still exist on the facts. (DRCR, paras. 1.44-1.67.) The material offered involves highly convoluted arguments based, to a great extent, upon the abbreviated proceedings on the Request for Interim Measures. The Government of Uganda does not see much value in a detailed examination of such materials. There is, in any case, a great deal of generality and repetition.

44. As on other occasions, the DRC invokes the Court’s Order relating to interim measures, but fails to understand the character of such proceedings. Presumably for this reason, the DRC avoids reference to the non-prejudice paragraph in the Court’s Order. (*See* Order, para. 46.)

E. The Appropriate Standard Of Proof

45. The contents of the largest section of Chapter I of the *Reply* are devoted to a response to Chapters VII and VIII of Uganda’s *Counter-Memorial*. In those chapters, Uganda pointed to the serious inadequacies of the evidential material offered in the *Memorial*. The DRC now assures the Court that no lessons have been learnt in this respect. In the words of the *Reply*:

Le langage tenu par la partie ougandaise est pour le moins excessif au regard de la quantité des sources présentées par le Congo à l'appui de sa demande. La RCD a d'ailleurs, dans l'ensemble, suivi la même méthodologie et utilisé les mêmes moyens de preuve dans le cadre de la présente réplique et, par conséquent, il est dès lors particulièrement important de répondre aux prétentions ougandaises sur ce point. La RCD montrera donc que les objections formulées par l'Ouganda à l'encontre de la méthodologie suivie par la RDC en matière de preuve sont dépourvues de fondement (1), et que les catégories de preuves qu'elle produit répondent aux exigences applicables dans ce domaine (2).³

(DRCR, para. 1.69; emphasis added.)

46. In these circumstances the Respondent State faces the necessity of a certain degree of reaffirmation of positions already adopted, given that the views expressed in the *Counter-Memorial* have not been effectively challenged in the *Reply*. In particular, the DRC has maintained its inability to prove imputability at the appropriate standard. In any event, Uganda's response will be reasonably succinct.

47. At the outset, the DRC does at least make some candid admissions, including the following:

Les documents présentés par la RDC sont pertinents, même lorsqu'ils n'établissent pas

³ "The language used by Uganda is to say the least excessive in view of the quantity and quality of the sources presented by Congo to support its claim. The DRC generally used the same methods of presenting evidence in the present *Reply* and, consequently, it is particularly important to respond to Uganda's allegations on this point. The DRC will therefore show that the objections made by Uganda against the method used by the DRC to present evidence lack basis (1), and the categories of evidence it presented meet the requirements that are applicable in this area (2)."

*expressément l'imputabilité de certains faits à l'Ouganda, ou ne concluent pas à la responsabilité de cet Etat.*⁴

(Heading before DRCR, para. 1.71.)

*Il est vrai que la plupart des documents présentés par le Congo ne concluent pas expressément à l'engagement de la responsabilité de l'Ouganda. Mais cette circonstance n'est nullement de nature à en affecter la pertinence. Il va de soi que, au stade de l'établissement des faits, ce qui importe est de prouver la matérialité de certains événements, et non de se prononcer sur leur qualification juridique.*⁵

(*Ibid.*, para. 1.73; emphasis added.)

Il est vrai également que, comme y insiste lourdement la partie défenderesse, une série de documents présentés par le Congo ne se prononcent ni sur la responsabilité ni sur l'imputabilité de certains actes à l'Ouganda. Ici non plus, le constat n'est cependant pas de nature à rendre non pertinentes de telles sources documentaires. Il faut en effet, dans le cadre de l'étape du raisonnement judiciaire consacrée à l'établissement des faits, bien distinguer les deux phases différentes que sont, d'une part, la preuve d'un acte et, d'autre part, l'imputation de cet acte. Ainsi, une chose est de démontrer

⁴ "The documents which were presented by the DRC are relevant, even though they do not expressly establish the imputability of certain facts to Uganda, or do not show that country's responsibility."

⁵ "It is true that most of the documents which were presented by Congo do not expressly establish Uganda's *responsibility*. But this circumstance does not in any way affect their relevance. It goes without saying, at the stage of establishing facts, that what is important is to prove the validity of certain acts, and not to state their legal consequences."

*que l'invasion d'une zone territoriale, ou encore qu'un massacre a eu lieu; autre chose est de prouver que cette invasion ou que ce massacre ont été perpétrés par des agents d'un Etat déterminé.*⁶

(*Ibid.*, para. 1.74; emphasis added.)

*A l'évidence, le simple fait que les documents présentés par la RDC ne comprennent dans certains cas aucune conclusion ne justifie en rien qu'ils soient écartés des débats.*⁷

(*Ibid.*, para. 1.75.)

48. The DRC contends (and this is a major contention in Chapter I of the *Reply*) that:

*En dépit de ce que prétend l'Ouganda, il suffit au Congo d'établir les faits sur la base de preuves "convaincantes" qui permettent d'atteindre une "certitude raisonnable."*⁸

(Heading before DRCR, para. 1.76.)

⁶ "It is also true that, as the respondent strongly insists, a series of documents which were presented by Congo do not indicate the responsibility or the *imputability* of certain acts to Uganda. This situation does not mean that such documentary sources are irrelevant. With respect to pleadings pertaining to the establishment of facts, we must make a distinction between the proof of an act and imputability of the act. Thus, it is one thing to show that one territorial area was invaded, or that a massacre was committed, and it is another to prove that the invasion of a territorial area or the massacre was perpetrated by the agents of a given State."

⁷ "Obviously, the fact that the documents presented by the DRC do not explicitly establish the responsibility or the imputability of particular facts to the Respondent State does not justify their exclusion from the pleadings."

⁸ "In spite of Uganda's allegations, it is enough for Congo to establish the facts on the basis of 'convincing' evidence that helps achieve 'reasonable certainty.'"

49. The DRC is obviously seeking to avoid the application of the existing standard of proof as formulated in the *Corfu Channel* case. (UCM, paras. 158-62.) The DRC cannot expect to launch serious complaints against another State and then claim that the standards affirmed in the *Corfu Channel* case (Merits) are inapplicable. In any event, the *Reply* provides no reasons for disregarding the *Corfu Channel* case.

50. The *Reply* also makes various observations about the attitude of tribunals to the admissibility of evidence. (DRCR, paras. 1.77-1.80.) However, the issue under examination is not the admissibility of evidence, but the standard of proof.

51. The DRC asserts the relevance of the resolutions and reports of international organisations. (DRCR, paras. 1.82-1.84.) In the opinion of the Government of Uganda the points offered in the *Reply* fail to advance the debate. In the *Counter-Memorial*, Uganda did not take a dogmatic position, but pointed to the need for caution in the evaluation of determinations of fact by political organs, citing significant authority. (UCM, Chapter IX, paras. 188-215.) Once again, in the related passages of the *Reply*, the DRC confuses the questions of admissibility and weight.

52. The DRC also affirms the relevance of official statements. (DRCR, paras. 1.85-1.88.) Uganda has no difficulty with the general principle involved, but would observe that the weight to be given to particular statements will necessarily vary with the circumstances.

53. The *Reply* also asserts the relevance of monographs and newspaper articles as evidence. (DRCR, paras. 1.89-1.92.) As is often the case, the DRC, in seeking to respond to the *Counter-Memorial*, misses the critical point. Uganda asserted the limited reliability of press reports. (UCM, paras. 117-18.) But Uganda did not suggest that press reports are in all respects inadmissible. The passages quoted by the DRC from the Judgment in the *Nicaragua* case exhibit a policy of “great caution.” (DRCR, para. 1.90.) That remains the position of Uganda.

54. The DRC next refers to the relevance of reports of non-governmental organisations. (DRCR, paras. 1.93-1.98.) In the opinion of the Government of Uganda such reports are in principle no more reliable than media reports. In general, such reports do not contain evidence on the basis of which a finding of State responsibility could properly be based. Moreover, certain non-governmental agencies are by no means independent and/or have their own agenda. In any event, the key test is whether the particular document provides reliable evidence relating to the particular fact in issue.

55. At paragraphs 1.99 to 1.115 of the *Reply*, the DRC argues that, in general, its evidence is somehow of greater reliability than that submitted by Uganda. (DRCR, paras. 1.99-1.115.) The DRC's central contention here is that it has submitted materials from "independent and impartial sources" that are thus impeccably credible. (DRCR, para. 1.114.) Here again, the DRC exhibits a basic confusion about this Court's evidential standards. What the DRC would pass off as "impartial" and "independent" sources, are in fact third-hand, hearsay (or multiple hearsay) accounts invariably written by people with no direct knowledge of the matters at issue. Although true that these documents were not prepared by the parties themselves, it is plainly *not* true that this fact alone can imbue such third-hand accounts with reliability. Indeed, as the Court expressly noted in the *Nicaragua* case, such journalistic and other accounts must be received only with the utmost caution, precisely because their reliability is so unknowable. (I.C.J. Reports, 1986, p. 41, para. 63.)

56. In contrast, Uganda has and will again in this *Rejoinder* submit substantial amounts of original source documentation and testimony from individuals with direct knowledge of the matters at issue. Indeed, as the Court will read, most of the evidence Uganda will now submit consists of sworn testimony given in open court and subject to cross-examination by individuals with first-hand knowledge of the matters discussed. Such court-tested testimony must obviously enjoy a far higher degree of credibility than anything offered by the DRC in the presentation of its case.

CHAPTER II

REAFFIRMATION OF UGANDA'S NECESSITY TO ACT IN SELF-DEFENCE

57. This Chapter responds to the factual allegations in Chapters II and III of the DRC's *Reply* concerning Uganda's military deployments in the DRC.

58. Chapters II and III of the *Reply* actually corroborate Uganda's position, fully demonstrated in the *Counter-Memorial*, that she sent her armed forces into eastern Congo solely for the purpose of lawful self-defence. Though purporting to deny Uganda's claim, the *Reply*, by its express factual admissions and by its failure to contest critical evidence presented by Uganda, underscores Uganda's argument that she acted strictly in the exercise of her inherent right of self-defence.

59. As shown below, the DRC has now admitted, either directly or by failure to contest, all of the essential factual elements that support Uganda's claim of self-defence, to wit:

- (i) That from the time of former President Mobutu Ssese Seko until the present, the Allied Democratic Forces ("ADF") and five other anti-Uganda insurgent groups have maintained bases in eastern Congo from which they have repeatedly launched armed attacks in and against Uganda;
- (ii) That successive Congolese Governments headed by Presidents Mobutu and Laurent Kabila either chose not to take any action to prevent these attacks against Uganda or were unable to do so;
- (iii) That the ADF was supported militarily, politically and financially by the Government of Sudan, which was then carrying out armed aggression against Uganda both directly across her own long border with Uganda and

through the anti-Uganda insurgent organisations based in eastern Congo;

- (iv) That, in the DRC's own words, "the ADF problem exploded" in 1997, and that by 1998 "the ADF constituted a real threat in southwest Uganda;"
- (v) That the threat to Uganda was so serious that, at least from late 1997 through the beginning of August 1998, the DRC authorised Uganda to maintain three battalions of the Uganda Peoples Defence Forces ("UPDF") in eastern Congo, and to carry out operations against the ADF and other anti-Uganda groups either on its own or jointly with Congolese Government forces;
- (vi) That, although the explanations for his actions in the *Reply* and the *Counter-Memorial* differ, President Kabila broke off his alliances with Rwanda and Uganda between May and July of 1998, and established new alliances with Sudan, Chad, the ex-FAR (former members of the Rwandan Army responsible for the genocide against the Rwandan Tutsi population in 1994), and the ADF and other anti-Uganda insurgent groups supported by Sudan;
- (vii) That on 2 August 1998, a rebellion broke out against President Kabila and his government, initiated and led by mutinous units of the Forces Armées du Congo ("FAC") stationed in eastern Congo, and quickly joined by the Banyamulenge, Congolese Tutsis disaffected with the government because of its anti-Tutsi bias;
- (viii) That during August 1998, with his new alliances then in place, and in furtherance of

them, President Kabila asked or allowed Sudan to: send Sudanese troops into Congo and occupy major airfields within striking distance of Uganda; drop bombs on the Ugandan troops that the DRC Government had allowed into the border regions of eastern Congo; and deliver arms and matériel to, and step up training and logistical support of, the anti-Uganda insurgents so that they could intensify their armed attacks against Uganda;

- (ix) That President Yoweri Museveni and other Ugandan leaders publicly warned President Kabila that his alliance with Sudan constituted a grave security threat to Uganda, and that Uganda could not sit idly by if the DRC continued to allow Sudan to station her troops in eastern Congo or to assume control of airfields within striking distance of Uganda;
- (x) That, despite these warnings, Sudan continued, with President Kabila's permission, to station troops in the DRC, to occupy strategic territory (including airfields in eastern and northeastern Congo), and to actively support the ADF and other anti-Uganda insurgent groups in their attacks on Uganda;
- (xi) That, faced with what she regarded as the gravest of threats to her security, Uganda decided on 11 September 1998 to drive the Sudanese out of eastern Congo and to prevent the ADF and other anti-Uganda groups from continuing to attack Uganda from Congolese territory. (Uganda's decision is reflected in a contemporaneous internal document, of the highest security classification, that Uganda nevertheless

annexed to the *Counter-Memorial* (UCM Annex 27));

- (xii) That thereafter Uganda sent her armed forces into the DRC where, between mid-September 1998 and mid-July 1999, following numerous engagements with the Sudanese, Chadian, ex-FAR, and ADF forces allied with President Kabila's FAC, they succeeded in accomplishing these objectives;
- (xiii) That in July 1999 Uganda, the DRC, all of the other States that then had troops in Congo, and each of the three main Congolese rebel movements signed a peace accord in Lusaka, Zambia, which became known as the Lusaka Agreement, and which established a new system of public order in the DRC. The Agreement provided, *inter alia*, for the phased and simultaneous withdrawal from the DRC of all foreign troops, including those of Uganda, *following* the disarmament, demobilisation, repatriation and rehabilitation of specially-designated "armed groups," including the ADF and five other anti-Uganda groups based in Congolese territory; and
- (xiv) That, even at the height of the conflict prior to the Lusaka Agreement, Uganda had fewer than 10,000 troops in eastern Congo, an area larger than Germany. These forces were concentrated in the regions adjacent to the Ugandan border and at airfields from which Uganda was vulnerable to attack. Since the Lusaka Agreement, and pursuant thereto, Uganda has withdrawn all of her armed forces from the DRC, except for a small presence that remains in the border region in strict accordance with the terms of a bilateral peace agreement between Uganda and the

DRC that was executed by the Presidents of both States at Luanda, Angola on 6 September 2002.

60. With one exception, all of the above is either expressly admitted by the *Reply*, or fully demonstrated by the *Counter-Memorial* and uncontested by the *Reply*. It must now be taken as fact. The only exception is the reference in subparagraph (xiv) to the bilateral peace agreement between Uganda and the DRC, which was achieved on 6 September 2002, after the *Counter-Memorial* and the *Reply* were submitted to the Court. Neither the existence of the agreement, incorporated in this *Rejoinder* as Annex 84, nor its express terms are or could possibly be in dispute. Thus, it too must now be taken as fact.

61. The principal thrust of the DRC's *Reply* is to attempt to show that, far from waiting until 11 September 1998 -- when, by virtue of Sudan's presence and actions in eastern Congo, the threat to Uganda's security was both severe and imminent -- Uganda sent her armed forces into the DRC as early as 2 August 1998 in support of the rebellion against President Kabila, and not in the exercise of her inherent right of self-defence. The *Reply*, for example, accuses Uganda of: (1) fomenting the 2 August rebellion of the FAC units; (2) participating in a coup d'état attempt against President Kabila on the same date; (3) attacking the Kitona military base in western Congo on 4 August, (4) attacking Kindu in southeastern Congo; (5) creating the RCD rebel organisation; and (6) sending additional troops into eastern Congo on 6 August.

62. None of these accusations is true; nor is any of them supported by what the *Reply* irresponsibly attempts to present to the Court as "evidence," almost all of which consists of unsubstantiated opinions or statements by unidentified persons, or multiple hearsay of the most unreliable kind, appearing in journal articles, or books by the same journalists (of unknown biases) who wrote those articles. The few purportedly "first-hand" accounts of events submitted by the DRC either do not say what the *Reply* wants them to say, or are so patently incredible as to be laughable. Uganda rejects them all and categorically affirms:

- (i) That Uganda did not foment, encourage, or contribute to the August 1998 rebellion by Congolese army units, or the attempted coup d'état against President Kabila. To the contrary, Uganda was deeply troubled by these events, which she regarded as threatening to her own interests in maintaining security in the border region;
- (ii) That Uganda did not create, organise, control or collaborate militarily with the RCD or any other Congolese rebel organisation during August 1998 (or prior thereto);
- (iii) That Ugandan troops did not participate in the attacks on Kitona or Kindu; and
- (iv) That Uganda did not send new troops into the DRC until after 11 September 1998. The only Ugandan troops in Congo prior to that date were the same three battalions, stationed in eastern Congo close to the Uganda border, which had been there since 1997 with the Congolese Government's consent.

63. Thus, despite the outbreak of war in the DRC at the beginning of August 1998 and the chaos the war generated directly across her border, Uganda initiated no military action for more than six weeks -- until the middle of September. By that time, as the evidence now conclusively shows, the threat to Uganda's security from Sudan, which, with the DRC's permission, was positioning troops and occupying airfields within striking distance of Uganda, became unacceptable. For this reason only -- to defend herself against a serious and imminent threat to her security -- Uganda sent her troops into eastern Congo.

A. The DRC's Admissions Regarding The Threat To Uganda's Security Posed By The ADF

64. The security threat to Uganda posed by the ADF and other anti-Uganda insurgent groups operating from Congolese territory was demonstrated at length in the *Counter-Memorial*. (UCM, paras. 17-23, 34-36, 40-41, 47-51, 61-64, 95-97.)

65. The DRC now admits the seriousness of this threat. The *Reply* acknowledges that the ADF “*a toujours opéré dans la région frontalière.*”⁹ (DRCR, para. 3.19.) It confirms that eastern Congo “*a toujours été le repère de mouvements irréguliers agissant à l’encontre des gouvernements tant du Congo puis du Zaïre, d’une part, que de l’Ouganda d’autre part. Aucun des deux Etats n’a jamais réussi à contrôler durablement cette frontière....*”¹⁰ (DRCR, para. 3.10.)

66. The ADF’s use of Congolese territory to stage armed attacks against Uganda transcended the regimes of Presidents Mobutu and Laurent Kabila. During the last years of Mobutu’s Presidency, “Anti-Museveni forces (the Allied Democratic Forces, the Lord’s Resistance’s Army and the West Nile Bank Front) were using Congo as a rear base from which to launch attacks against Uganda.” (DRCR, para. 3.98.) But, “*le renversement du régime du Maréchal Mobutu ne paraît guère avoir modifié la situation sur le terrain en Ouganda. Les différentes forces rebelles maintiennent leurs activités pendant toute la période qui fait l’objet de notre analyse.*”¹¹ (DRCR, para. 3.16.) Indeed, “[c]omme elles l’ont toujours fait dans le passé, les forces de l’ADF ont continué de se réfugier en territoire congolais. Dès le mois de mai 1997, il semble

⁹ “has always operated in the border areas.”

¹⁰ “has always been the theatre of irregular rebel movements acting against both the governments of Congo and Zaire on one hand and Uganda on the other. None of the two States has ever been able to sustainably control this border....”

¹¹ “Mobutu’s overthrow does not seem to have changed the situation on the ground in Uganda. The different rebel forces maintained their activities during the entire period that we are analysing.”

d'ailleurs que certains membres des ex-FAZ ... se soient joints à cette force rebelle. L'ADF gagne alors momentanément des positions dans l'ouest de l'Ouganda, et ses opérations se poursuivent de plus belle."¹² (DRCR, para. 3.15.)

67. Moreover, the DRC concedes that "the ADF problem exploded in 1997." (DRCR, para. 3.20.) According to the DRC and its sources, the "explosion" was the result of support from "Sudan, des milices interhamwes rwandais ou d'anciens militaires issus des armées de Mobutu et d'Habyarimana."¹³ (DRCR, para. 3.21.) After the fall of Mobutu, the ADF was "renforcé[] par le ralliement de milliers de soldats des anciennes armées rwandaise et zaïroise."¹⁴ (DRCR, para. 3.21.) By 1998, the ADF sought to "coordonner un front uni de l'opposition ougandaise que tentent d'organiser les autorités de Karthoum. Pour ce faire, le mouvement envisage de monter des opérations en coordination avec la LRA et le WNBF."¹⁵ (DRCR, para. 3.22.) Thus, by "l'automne 1998, l'ADF constitue une menace réelle dans le sud-ouest ougandais."¹⁶ (*Ibid.*)

68. While confirming that the ADF and other anti-Uganda insurgent groups operating from Congolese territory constituted a "real threat" to Uganda's security, the DRC argues in the *Reply* that she never provided direct support to any of these

¹² "[a]s they had done in the past, the ADF continued to take refuge in Congolese territory. From May 1997, it seems certain members of the ex-FAZ (Zairean Armed Forces) joined this rebel force. ADF thus momentarily captured areas in western Uganda, and its operations are continuing strongly."

¹³ "Sudan, the Rwandese Interahamwe militia and former soldiers who were in Mobutu and Habyarimana's [*i.e.*, the former President of Rwanda] armies."

¹⁴ "reinforced by the rallying of thousands of former soldiers of the former Rwandese and Zairean armies."

¹⁵ "coordinate a united Ugandan opposition front which tried to mobilise support from the Khartoum authorities. In order to do this, the movement planned to carry out joint operations with the LRA and WNBF."

¹⁶ "the autumn of 1998, the ADF constituted a real threat in South-western Uganda."

groups. Rather, she contends, she simply was not able to exercise effective control over the eastern border regions where they operated. (*See, e.g.*, DRCR, paras. 3.20, 3.34, 3.81, 3.82.) Uganda presented extensive proof of the DRC's support for the ADF and other anti-Uganda groups in the *Counter-Memorial*. (UCM, paras. 33-41.) The *Reply* challenges this proof. (DRCR, paras. 3.68-3.79.) Uganda acknowledges the difficulty of establishing, by first-hand account, the direct military relationship between the DRC and the ADF, especially in the face of the DRC's deliberate efforts to carry on this relationship in secrecy. Nevertheless, Uganda feels she has carried her burden in this regard.

69. Moreover, in addition to the evidence presented in the *Counter-Memorial*, the covert military support given by President Kabila's government to anti-Uganda groups is demonstrated by further items of evidence that merit the Court's attention.

70. The first is a 2 February 1998 letter in which the ADF reached out once again to Col. Mathias Ebamba, the ex-FAZ officer in charge of coordination with anti-Uganda insurgent groups during the Mobutu era, who was reappointed by President Kabila to the eastern DRC as part of the newly formed FAC. (UCM, para. 34.) The letter demonstrates the ADF's closeness to Col. Ebamba, expresses gratitude for his past support, and reaches out to him to renew that support:

Col. Ebbamba

Dear Sir we're greeting you with much respect and honour.

First we thank the Almighty God who enables us to reach this time when we're still existing on this Earth. Actually this is so great, we've to praise him and thank him each and every time and we are sure that he will give us a joyful victory.

Dear sir since we heard that you were admitted this way again, we were so glad to

had that news because we still hope that you never change your mind even if you are in another regime by now.

On our side we still continue with our struggle of liberating our mother country 'U' therefore we are in much need of your help if you never change your mind. We still believe that you're our father and we can't forget these you did for us and we're praying to God to reward you a good success in all your jobs.

By all of these we can decide to send to you our personal messenger to meet you but after we have received your reply of assuring us that you will wellcoming him with peace and love.

We need your reply very soon through that Gentleman who will give you this letter by all means either by words or by writing a letter, we are waiting for it with more pleasure and hope that you can't give up your morale therefore we're requesting you to tell us exactly what is your position in this our struggle of liberating our mother country from 'Batutsi's' hand [*i.e.*, from Tutsi control].¹⁷

And if you have a telephone you can give us your No. and it will be easy to contact you secretly through that telephone.

We think you will enjoy with this message from your own Sons, let us pray to God to enables us meet one day in his days.

¹⁷ The ADF consistently, but erroneously, referred to President Museveni as a Tutsi.

Yrs faithfully

Yusufu.¹⁸

(UR Annex 21.)¹⁹ While Uganda was not privy to Col. Ebamba's response to the ADF's overture, developments in the region made plain that the response was positive.

71. In fact, even before Col. Ebamba was reassigned to Beni, in eastern Congo, there was evidence of collaboration between the FAC and the ADF. According to an internal report from the Ugandan External Security Organisation:

In January 1998, Col Kasareka of FAC conspired with the ADF who killed 17 UPDF soldiers in Lume. Following this incident he was transferred and replaced by Col Ebemba Mathias who had armed and facilitated the ADF and NALU rebels during Mobutu's era.

(UR Annex 108, p. 10.) Upon his return to eastern Congo, Col. Ebamba picked up where Col. Kasareka left off and continued Congolese army support for the ADF. (UCM, para. 34.)

72. The active collaboration between the DRC Government and the ADF is further confirmed by the statement of Mohamed Kiggundu, former Chairman of the UNFM/A, an anti-Uganda rebel group that allied with the ADF in 1998. He states:

Having made an alliance with the ADF in 1998, I came to understand the following

¹⁸ Yusuf Kabanda was Chief Director of the ADF's political wing. (UCM Annex 60, p. 1.)

¹⁹ In his sworn testimony before Uganda's Porter Commission (the nature and purpose of the Porter Commission are discussed at note 28 below), General James Kazini, former commander of UPDF troops in the DRC, stated that the letter had been recovered among materials Col. Ebamba left behind in Beni. (UR Annex 60, Part A, pp. 32-40.)

terms under which we were in alliance with the Congo.

The Congo government had provided uninterrupted passage through the Congo to the ADF bases.

The Congolese government also provided space for purposes of delivery of equipment and manpower to the ADF bases. (Beni, Lugetsu)

The Congolese government also provided ground for purposes of camping and training.

Funds were also remitted in the specified amounts from the Congolese government to the ADF.

The following were contacts who helped link up the ADF to the Kinshasa government[:] KABEBA, ABBEY MUTEBI ... GEN. MBOKA, GEN. ELUKI and Gen. BALAMOTO

(UR Annex 86.)

73. The military contacts between the DRC and the ADF extended to the highest levels:

On 9.8.98, Taban Amin, son of [former Ugandan dictator] Idi Amin was appointed ADF's Chief of Staff. He came to the DRC in 1997 after the defeat of [the West Nile Bank Front]. Prior to its defeat, WNBFF freely operated from Bunia, Garamba National Park and Ariwara. *Taban became close to Kabila. He even escorted him to Morocco in May 1998.*

(UR Annex 108, p. 12; emphasis added.)

74. Thus, by the middle of 1998, President Kabila's policy toward Uganda had changed from one of cooperation to one of hostility. Whereas, in 1997, he actively collaborated with Uganda in a joint effort to eliminate the threat to Uganda's security posed by the ADF, by May 1998 he was courting the ADF's leadership, and soon thereafter collaborating with it against Uganda.²⁰ Dr. Kamanda Bataringaya, Uganda's Ambassador to the DRC, who observed this change in policy at first hand, declared:

15. That after the fall of the Mobutu government in 1997, President Laurent Kabila's regime in the now-renamed DRC initially offered Uganda cooperation in dealing with the long-standing problem of anti-Ugandan insurgents operating from the territory of the DRC.
16. That indeed, there were efforts towards joint military operations between the Uganda People's [Defence] Forces and the FAC targeting the insurgents.
17. That in mid-1998, however, the degree of President Kabila's cooperation that I observed began to decline. Although the DRC's nominal policy remained one of cooperation right up until August 1998, the actual cooperation dwindled to zero.
18. That prior to August 1998, President Kabila and other elements of the DRC regime began actively supporting and collaborating with anti-Ugandan forces

²⁰ According to a report submitted by the Director of Uganda's External Security Organisation to President Museveni, ADF recruits who had been receiving military and political training at the Congolese military training facility at Kinyogoti, DRC were turned out and ready for combat in July 1998. (UR Annex 28.)

including insurgents known as the Allied Democratic Forces (ADF) as well as Sudan.

19. That ... among the intelligence documents located in the Ugandan embassy in Kinshasa are documents evidencing these facts
20. That for example, I recall a document concerning the fact that the Sudanese government was supplying ADF rebels operating out of Eastern Congo with arms and ammunitions [with] the knowledge and consent of the DRC government.²¹

(UR Annex 87, paras. 15-20.)

75. Although it denies that there were direct military links between the DRC Government and the ADF, the *Reply* concedes that military support was provided to the ADF and other anti-Uganda insurgent groups via the triangular relationship between those groups, the Government of the DRC and the Government of Sudan.

76. After citing various sources, the *Reply* asserts repeatedly that Sudan is “[un] soutien actif de ces mouvements rebelles, et non la RDC,”²² (DRCR, para. 3.22), and that “c’est ici encore la République du Soudan qui est citée, et non la RDC”²³ as the source of “external support” for the anti-Uganda insurgents. (DRCR, para. 3.23.) Moreover, as the *Reply* acknowledges, and as detailed below, the military support given by Sudan to the ADF and other anti-Uganda groups in the DRC was provided

²¹ Dr. Bataringaya was forced to flee Kinshasa in August 1998. At the time, the FAC seized the Ugandan Embassy and confiscated all of its property, including all of Dr. Bataringaya’s documents. (UR Annex 87, para. 9.) Thus, he was not able to bring them back to Uganda with him.

²² “an active source of support for these rebel movements, and not the DRC,”

²³ “it is again the Republic of Sudan that is mentioned, not the DRC”

with the full knowledge and consent -- indeed, with the express approval -- of the DRC Government, in furtherance of a military alliance that President Kabila established with Sudan between May and July 1998.

77. Thus, it begs the question for the DRC now to deny responsibility for the armed attacks carried out against Uganda by the ADF and other anti-Uganda groups operating from Congolese territory on the dubious ground that the DRC herself provided no direct military support to those groups. As the admitted and uncontested facts now show, the DRC Government licenced Sudan to provide military support to the Congo-based anti-Uganda insurgents, and she did so. In these circumstances, the DRC Government is as responsible as Sudan for the insurgents' armed attacks in and against Uganda, or as she would be if she supported the attacks directly. (*See infra*, Ch. III, para. 277.)

B. The DRC's Admissions Regarding The Threat To Uganda's Security Posed By Sudan

78. In the *Counter-Memorial*, Uganda amply demonstrated the threat to her security posed by President Kabila's military alliance with Sudan, the arrival of thousands of Sudanese troops in eastern and northeastern Congo, the Sudanese occupation of strategic airfields within striking distance of Uganda, and Sudan's stepped up military support for the anti-Uganda insurgents attacking Uganda from Congolese bases. (UCM, paras. 38, 48-50, 52.)

79. In her *Reply*, the DRC meekly contends that some of the assertions in the *Counter-Memorial* about President Kabila's meetings and agreements with senior Sudanese Government and Army officials are unsupported, or even contradictory. Uganda disagrees. In fact, the source of the assertion that President Kabila made a clandestine visit to Khartoum in May 1998 to establish a secret military alliance with President Omar Bashir of Sudan is none other than the DRC's then Foreign Minister, Dr. Bizima Karaha, as acknowledged in one of the DRC's own sources. (International Crisis Group, Congo Report No. 3, *How*

Kabila Lost His Way, p. 22 (1999) (cited, *inter alia*, at DRCR, para. 2.08.)

80. Moreover, the alleged contradiction in Uganda's assertions about meeting dates in May and August 1998 (DRCR, para. 3.70) is easily explained by the fact, made clear in the *Counter-Memorial*, that there were two separate meetings. The first, in May, involved President Kabila's secret meeting with Sudanese President Omar Bashir to initiate the military alliance between the DRC and Sudan. (UCM, para. 38.) The second, in August, solidified and deepened the already-existing military cooperation between the DRC and Sudan. (UCM, paras. 49-50.) In fact, in addition to these two meetings in Khartoum, President Kabila had a third meeting with the Sudanese, this one in Gbadolite, where he flew secretly to meet with Sudanese Vice President Ali Othman Taha to arrange for the incorporation of Sudanese-trained anti-Uganda rebels into the FAC, and for increased weapons and logistical support to the ADF. (UCM, para. 50.)

81. Most significant about the threat to Uganda's security posed by Sudan is what the *Reply* does *not* say. Specifically, it does not deny *any* of Uganda's assertions about the military alliance between President Kabila and Sudan, or about any of the actions taken by Sudan or the DRC in furtherance of that alliance. This is quite extraordinary. Uganda's statements about the DRC's complicity with Sudan in carrying out armed aggression against Uganda are so damning that it can only be presumed that, if there were any basis for denying them, the DRC would have done so. Her silence in these circumstances is, therefore, quite stunning. It leaves room for only one conclusion -- that the following declarations in Uganda's *Counter-Memorial* must be taken as true:

- (i) Sudan provided military assistance to the DRC in the form of arms, troops and equipment;
- (ii) In return, the DRC put airfields in eastern and northeastern Congo at Sudan's disposal;

- (iii) Sudan used the airfields to deliver matériel to the FAC and to the anti-Uganda insurgent groups operating in Congo, including the ADF and WNBF;
- (iv) The DRC and Sudan resumed military coordination with the anti-Uganda insurgents;
- (v) Sudan airlifted 3,500 anti-Uganda insurgents of the WNBF to Kinshasa where they were incorporated into the FAC and sent to fight alongside FAC;
- (vi) Sudan airlifted to Kindu her own army units, plus several thousand anti-Uganda insurgents from the WNBF and LRA, to fight alongside DRC Government forces against Congolese rebels and the Rwandan Army;
- (vii) Sudan persuaded the Government of Chad to enter the war as her (and the DRC's) ally, and the Sudanese air force transported an entire Chadian brigade, consisting of 2,500 troops, to Gbadolite, in northern Congo, with the mission of attacking the Ugandan forces stationed in eastern Congo;
- (viii) Sudanese Brigadier Saladin Khalil oversaw the delivery of three planeloads of weapons to the FAC in Kinshasa on 14 August 1998;
- (ix) Sudan stepped up her training of FAC troops, including ex-FAZ, ex-FAR, WNBF, ADF and Rwandese Interahamwe Militia Units that had been incorporated into the FAC;
- (x) President Kabila flew to Khartoum in August 1998 to reaffirm his military alliance with Sudan, and arranged for more Sudanese military assistance to his government,

including the contribution of a Sudanese brigade in eastern Congo;

- (xi) President Kabila met with Sudanese Vice President Ali Othman Taha soon thereafter in Gbadolite, where they agreed on a direct combat role for the Sudanese military in Congo, the further incorporation of Sudanese-trained anti-Uganda rebels into the FAC, and an increase in weapons and logistical support to the insurgents operating in eastern Congo;
- (xii) Sudanese Antonov aircraft bombed UPDF positions at Bunia, in eastern Congo, on 26 August 1998;
- (xiii) Sudanese Colonel Ibrahim Ismail Habiballah delivered a planeload of weapons to the FAC in Gbadolite on 2 September 1998, for use by anti-Uganda UNRF II units that had been incorporated into the FAC; and
- (xiv) A Sudanese army brigade of approximately 2,500 troops under the command of Sudanese Lieutenant General Abdul Rahman Sir Khatim landed in Gbadolite, moved out to Businga, and prepared to engage the UPDF forces in eastern Congo.

(UCM, paras. 38, 47-52.) It bears repeating that none of these facts is denied in the *Reply*.

82. One element on which the *Reply* is *not* silent is President Kabila's decision in the middle of 1998 to end his alliances with Rwanda and Uganda and establish a new one in their place with Sudan. The *Reply* concedes that this is exactly what happened. It cites approvingly contemporaneous sources stating that "Kabila is reported to be looking for new external alliances with Sudan, Cuba, the Central African Republic, Zimbabwe and Angola, as well as among other internal groups like the former Rwandan Army and Interahamwe militia, ex-Mobutu, Mai Mai,

ADF rebels ... who are hostile to Rwanda, Uganda and Burundi.” (DRCR, para. 3.24.) The *Reply* goes on to quote approvingly from sources reporting that “Kabila has rehabilitated the groups that he fought against with the AFDL -- the ex-FAR, FDD and ADF -- in order to weaken his former allies.” (*Ibid.*)

83. The only disagreements between the *Reply* and the *Counter-Memorial* with respect to President Kabila’s dramatic change in alliances are about why and when it occurred. As to why, Uganda suggested in the *Counter-Memorial* that President Kabila’s failed domestic policies and resulting unpopularity led him to join, and even assume leadership of, the growing nationalist and ethnic backlash against Rwandan and Congolese Tutsi domination of the Congolese Government and Army. (UCM, paras. 33, 37, 42.)

84. The *Reply*, more charitably to President Kabila, attributes his decision to ally himself with his allies’ enemies to his fear that “*son désir d’indépendance pourrait être sévèrement sanctionné par ceux qui l’avaient aidé au pouvoir*”²⁴ (DRCR, para. 3.24.) What is important about this assertion, however, is that it confirms what Uganda has said -- President Kabila made a deliberate decision in mid-1998 to cast off his associations with Rwanda and Uganda in favor of a new alliance with Sudan and other entities hostile to Uganda, Rwanda or both.

85. The disagreement about timing is more significant. The *Reply* argues that President Kabila’s military alliance with Sudan and the anti-Uganda insurgent groups did not pose a threat to Uganda’s security until *after* Uganda had already launched an armed intervention into the DRC in the guise of a domestic uprising on 2 August 1998. Thus, the *Reply* contends, the DRC’s alliance with Sudan and the anti-Uganda insurgents, and all of the actions taken in furtherance thereof (which the DRC now admits), were nothing more than an exercise of *the DRC’s* inherent right of self-defence against an armed attack by

²⁴ “his desire for independence would be resisted by those who had helped him to take power....”

Uganda. (DRCR, paras. 3.24, 6.49.) In this fashion, the DRC virtually concedes that, if Uganda did not attack her on or about 2 August 1998, but instead waited until after 11 September 1998 before sending her troops across the border into eastern Congo (as set forth in the *Counter-Memorial*, paras. 53-54), the aggressor State could only be the DRC herself. That is exactly what happened.

86. The *Reply* acknowledges that Uganda felt that her security was seriously threatened by the DRC's military alliance with Sudan especially, and that Uganda's President manifested his vociferous protest about the arrival and stationing of thousands of Sudanese troops in strategic Congolese locations from which his country could easily be attacked. The *Reply* quotes President Yoweri Museveni on several occasions during this period issuing explicit warnings that Uganda would not tolerate the presence of Sudanese troops so close to her borders, or at airfields that could be used to bomb Ugandan targets, and urging DRC authorities to remove this grievous threat to Uganda's security.

87. In particular, on 9 September 1998, President Museveni publicly announced that the three Ugandan battalions stationed in eastern Congo since 1997 would not be removed "until he received assurances from Kabila that neither the Ugandan rebels nor the Sudanese military would use Congolese facilities for attacks on Kampala." (DRCR, para. 3.60.) When no such assurances were received and, instead, Sudanese forces continued their buildup in eastern and northeastern Congo, Uganda decided, two days later on 11 September, to dispatch her troops against the Sudanese and the anti-Uganda insurgents. (UCM Annex 27.) On 16 September, after this decision was made but before it was executed, President Museveni made one last public plea to President Kabila to remove "the threats to Uganda's security emanating from the DRC" that "make Uganda's involvement inevitable...." (DRCR, para. 3.59.)

88. The DRC chose to ignore these entreaties. As a consequence, Uganda pursued the only action possible to eliminate the imminent threat to her security posed by the Sudanese military presence in eastern and northeastern Congo.

Between 16 and 20 September 1998, she sent her troops into Congo to drive the Sudanese out.

C. The DRC's Admissions Regarding Her Consent To The Presence Of Ugandan Troops In Congolese Territory To Address The Threats To Uganda's Security

89. The DRC admitted in her *Memorial* that Ugandan troops entered the DRC by invitation from the Congolese Government, in recognition of the threat posed to Uganda's security by attacks in and against Uganda carried out by the ADF and other anti-Uganda insurgents based in eastern Congo. (*Memorial* ("DRCM"), paras. 5.23, 5.37.) In the *Reply*, the DRC further admits that "[d]es opérations conjointes des forces armées des deux Etats dans la région frontalière ont ainsi été envisagées dès le mois de septembre 1997."²⁵ (DRCR, para. 3.37.) Further, "the DRC has permitted Ugandan military forces to carry out operations and in some cases to conduct joint patrol activities" inside Congo. (*Ibid.*) Thus, "[d]ifférentes actions militaires ougandaises ont ensuite été menées en territoire congolais avec l'accord des autorités locales,"²⁶ citing as examples operations in December 1997 and February 1998. (DRCR, para. 3.38.)

90. Eventually, "[l]a coopération accrue de la RDC et de l'Ouganda en matière de sécurité a encore ... été organisé de manière plus structurelle,"²⁷ resulting in the Protocol signed by the two States on 27 April 1998. (DRCR, para. 3.40; UCM Annex 19.) As set forth in the *Reply*, "the two parties recognised the existence of enemy groups which operate on either side of the common border. Consequently, the two armies agreed to co-operate to ensure security and peace along the common border." (DRCR, para. 3.40.) The Protocol

²⁵ "[j]oint operations of the armed forces of the two States inside the border region were thus planned right from September 1997."

²⁶ "[v]arious military operations were then carried out by Uganda on Congolese territory with the permission of the local authorities,"

²⁷ "[t]he increased cooperation of the DRC and Uganda in security matters was organized in a more structured manner,"

formalised the arrangement under which Uganda maintained three battalions in eastern Congo, in or near the Congolese towns of Beni and Butembo, close to the Ugandan border.

91. In sworn, public testimony before an independent investigative commission appointed by the President of Uganda,²⁸ the Honorable Ralph Ochan, Permanent Secretary in Uganda's Ministry of Foreign Affairs, described the circumstances in which the Protocol was adopted:

Mr. Ochan:

The circumstances my Lord under which the agreement was written must be taken into account in trying to interpret it in terms of the roots of the Public International Law....

Justice Porter:

We just really wanted the explanation of the problem.

Mr. Ochan:

My explanation of the problem is really straightforward, there were incursions in

²⁸ The Commission, known as the "Porter Commission" after its Chairman, Justice David Porter, is an independent, judicial panel established to investigate allegations concerning the exploitation of the DRC's natural resources contained in the April 2001 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo ("First UN Panel Report"). S/2001/357 (12 April 2001). The Porter Commission, the work of which is on-going, received considerable amounts of sworn witness testimony, most of which was received in open court, and subject to vigorous cross-examination by the members of the Commission. Much of that testimony is reproduced in the Annexes attached hereto. (UR Annexes 58-67, 78.) Although the Porter Commission's mission was to investigate allegations concerning the exploitation of the DRC's natural resources, it received considerable evidence bearing on other issues pertaining to the deployment of Ugandan armed forces in the DRC. For a brief introduction to the Commission, its work and its members, see pages 1-2 of Annex 58 attached to this *Rejoinder*. (UR Annex 58, Part A, pp. 1-2.)

Uganda, schools were burnt down, school children were killed, 83 of them were burnt in Kicwamba, there was a massive invasion at Mpondwe. So this agreement meant that in effect the UPDF was permitted to ensure that they go to the root cause, to the homes, to the bases of these perpetrators of this on the western border. This is the background my Lord.

Justice Berko:

Mr. Ochan, you see before this protocol was negotiated or was agreed upon, Congolese had security concerns in their area and Uganda had security concerns in their area. Now fill in these agreements Uganda had been in Congo but Congolese had not been in Uganda. So the way you see it is that Congolese interpreted to mean that they have to be in their country to secure the border there and then UPDF will be on our side to secure the border.

Mr. Ochan:

That is not correct my Lord.

Justice Berko:

What did this mean?

Mr. Ochan:

First of all the reason it was easy for rebels to cross over into Uganda and burn down schools and kill school children because there was no effective administration in the eastern part of the Congo. The basis of this agreement is that UPDF would cross over and maintain Law and order and make sure that the homes where the rebels were found

and Congolese stayed free, the problem was addressed by our own troops my Lord it is common knowledge that the DRC did not have any effective administration and that explains why rebels could have come and could train there, could fly equipment there to cross into Uganda and cause extermination. The Congolese recognised this and allowed our people. The problem was in the homes of the rebellion where the rebels committed murder in the eastern part of the DRC.

(UR Annex 64, Part A, pp. 6-7.)

92. Given the DRC's admitted inability to maintain security on her side of the border with Uganda, together with the fact that armed attacks were occurring in one direction only (*i.e.*, from the DRC into Uganda), there can be no mistaking the purpose of the Protocol -- to allow Uganda to operate in the DRC against the anti-Uganda insurgents.

93. In fact, the purpose of the Protocol has been amply admitted by the DRC. As already cited above, the DRC's original *Memorial* states unambiguously: "Prior to 28 July 1998, Ugandan troops were present on the territory of the Democratic Republic of the Congo with the consent of the country's lawful Government." (DRCM, para. 5.23; Eng. trans.)

94. The *Reply* tries to avoid the effect of this flat admission by contending that any argument based thereon is "*irreceivable*."²⁹ (DRCR, para. 3.204.) Yet, the DRC offers no reason why this should be so. To the contrary, a statement formally submitted to the Court in a pleading signed by an officially designated Agent of the DRC Government must be deemed an admission by which the DRC is bound.

²⁹ "inadmissible."

95. Having admitted that Ugandan troops were present on Congolese territory by consent at least through 28 July 1998, it is up to the DRC to prove that such consent was withdrawn at some later moment in time. The DRC's attempts to shift the burden of proof to Uganda to show continuing consent must fail. (*See* DRCR, para. 3.206.) Even if the burden might have been on Uganda to show consent in the first instance, having satisfied this requirement, the burden must shift back to the DRC to show the withdrawal of consent given earlier.

96. To this effect, the DRC argues that President Kabila's "decree" of 27 July 1998 announcing the withdrawal of *Rwandan* troops from Congolese territory constitutes the requisite withdrawal of consent for the presence of *Ugandan* troops. (DRCR, para. 3.207.) The slender reed for this argument is President Kabila's statement at the conclusion of the decree that: "This marks the end of the presence of all foreign military forces in the Congo." (DRCM, para. 2.11; Eng. trans.) Uganda has already amply addressed the DRC's argument based on this decree in the *Counter-Memorial*. (UCM, paras. 43, 293-94.) Rather than reiterate points already stated, Uganda will only deal with the issue here to the extent necessary to refute new elements of the DRC's argument.

97. First, reading the full 126 words of the decree in context, it is clear that these last 15 words do not sweep as broadly as the DRC would now prefer, and that they in fact refer only to Rwanda's armed forces. Thus, the very first line of the decree announces that President Kabila terminated "the Rwandan military presence which has assisted us during the period of the country's liberation." (DRCM, para. 2.11; Eng. trans.) In a like vein, the second line continues: "Through these military forces, he would like to thank all the Rwandan people for the solidarity they have shown to date." (*Ibid.*) Nowhere in the text is either Uganda or the UPDF mentioned. This is not accidental. Indeed, the *Reply* itself describes President Kabila's 27 July 1998 announcement in the following words: "*Dès son retour de Cuba, il annonce officiellement, le 27 juillet 1998, la fin de la coopération militaire avec le Rwanda et demande aux militaires rwandais de regagner leur pays, tout en précisant que cela marque la fin de la présence des troupes étrangères au*

*Congo.*³⁰ (DRCR para. 2.27.) Thus, the DRC cannot now maintain that this announcement pertained to Uganda, let alone that it constituted a withdrawal of the DRC's formal consent to the limited presence of Ugandan forces in the eastern border region.

98. In fact, the *Reply* fails to show that any formal action was taken by the DRC Government to terminate her consent to the presence of Ugandan troops in Congolese territory, up to and including the time in mid-September 1998 when Uganda introduced additional troops into eastern Congo. The *Reply* cites no message, written or verbal, sent from the DRC Government to Uganda terminating such consent. Nor does the *Reply* identify any formal or diplomatic message sent by the DRC to Uganda demanding the withdrawal of her forces from eastern Congo. Thus, as the *Reply* acknowledges, as late as 21 August 1998, President Museveni, with reason, publicly stated that the presence of "UPDF battalions in DRC behind Mount Rwenzori, to combat ADF and other lawless elements," was "by mutual understanding with President Kabila." (DRCR, para. 3.58.)

99. To be sure, the *Reply* cites public statements or speeches by various DRC officials in August 1998 that accuse Uganda of armed aggression, demand withdrawal of her forces from Congo, and are otherwise inconsistent with an official policy of consenting to the limited presence of these forces. (*See, e.g.*, DRCR, paras. 3.207-3.208.) Nevertheless, the DRC has failed to show when, or even whether, her official consent to Uganda's troop presence in the border region was formally withdrawn.

100. In any event, by August 1998, the continuation of this limited presence was vital to Uganda's security. With the outbreak of the rebellion against President Kabila and his government on 2 August, the collaboration between FAC units

³⁰ "As soon as he returned from Cuba, he officially announced, on 27 July 1998, the end of military cooperation with Rwanda and asked the Rwandese soldiers to go back to their country. He also announced that that marked the end of the presence of foreign troops in Congo."

that remained loyal to President Kabila and the ADF, the entry into Congo of various foreign armies -- some supporting the DRC Government and others opposing it -- and the total collapse of central administrative authority in the border region, the security threat to Uganda that justified the presence of Ugandan troops in eastern Congo since late 1997 became much worse.

101. As fighting erupted all around them, the three UPDF battalions already in the DRC consolidated their positions and defended themselves in some engagements with the combined forces of the ADF and FAC. Some of those UPDF forces which were already in the DRC entered Bunia, only 30 km. from the Ugandan border, without encountering any resistance, as the DRC acknowledges. (DRCR, para. 2.59.) The purpose, according to President Museveni, as quoted in the *Reply*, was "to preserve Ugandan security." (DRCR, para. 3.61.) Under these circumstances, the calls by various DRC officials for Uganda to withdraw her troops was itself a hostile act that threatened Uganda's security.

102. As indicated, prior to the middle of September, Uganda neither withdrew nor augmented her forces in the DRC. By that time, all of the actions by Sudan in furtherance of her military alliance with the DRC identified above were taken. (*Supra*, para. 81.) Thus, while the DRC is unable to place a date on her alleged withdrawal of consent for the presence of Ugandan troops in eastern Congo, it is clear that by the time consent was allegedly withdrawn, Uganda's military presence in the DRC was absolutely necessary to her self-defence.

103. In his sworn testimony to the Porter Commission, Uganda's Minister of Defence, Hon. Amama Mbabazi, described the sequence of events leading to Uganda's 11 September 1998 decision to send additional troops into eastern Congo:

When the rebellion broke out, it spread quickly. And although it broke out in the east, the main fighting and attack came from the west of Congo -- from the port of Matabi

side towards Kinshasa; and there were very quick developments Then there was a regional meeting -- there was a summit on this, then in quick succession, I would say, President Kabila flew into Khartoum and, like his predecessor, forged an alliance with Khartoum to come to his aid militarily.

So we, therefore, realised that there was greater danger facing us from Congo than we had originally envisaged, with the coming in of the Sudan. There was intensified supply of arms and deployment of armed rebel groups -- Ugandan rebel groups, some of whom had been trained in Sudan and were flown into eastern Congo. There was consistent supply mainly from the air, by the Sudan, of the ADF and a pro-Idi Amin army or armed group that had now been organised in northeastern Congo as well. So it was obvious that we had a fight at our hands and we decided therefore, to commit more troops into the situation in Congo.

(UR Annex 65, Part B, p. 22.)

104. Uganda's successful military effort to drive the Sudanese forces out of eastern and northeastern Congo, and to arrest once and for all the activities of the ADF and other anti-Uganda insurgents operating in the area, was carried out between September 1998 and July 1999, climaxing in the battle of Gbadolite, which sent the Sudanese fleeing across the border and out of the war.³¹ By the end of July 1999, the DRC's consent to the presence of Ugandan forces in its territories was again obtained, this time as part of the Lusaka Agreement, more fully discussed in paragraphs 213 to 226 below. Under the

³¹ A description of the UPDF's military engagements with Sudanese and other forces in eastern Congo during this period is provided in the *Counter-Memorial*. (UCM, paras. 52-54.)

provisions of that Agreement, the DRC agreed that Ugandan forces would remain in place in eastern Congo, until the “armed groups” that had been attacking it from Congolese territory were disarmed, demobilised, repatriated and rehabilitated. (UCM Annex 45, para. 22.) Even then, the Agreement provided that Ugandan troops would only be withdrawn simultaneously with the withdrawal of all other foreign forces in the DRC. (*Ibid.*, para. 12 & Annex A, Ch. 4.)

105. The DRC’s consent to the continued presence of Ugandan forces in eastern Congo was renewed again in the bilateral agreement signed by the Heads of State of the DRC and Uganda at Luanda, Angola on 6 September 2002: “The Parties agree that the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda’s security, including training and coordinated patrol of the border.” (UR Annex 84, Art. I, para. 4.) The implications of this agreement are discussed, as well, in paragraphs 229 and 233 below.

D. The DRC’s Failure To Establish That Uganda Intervened Militarily In The DRC Prior To Mid-September 1998

106. The core of the DRC’s case is that Uganda invaded it on 2 August 1998. This thesis is repeated numerous times in the *Reply*. (See, e.g., DRCR, paras. 0.03, 1.15, 1.41-1.42, 2.01-2.02, 2.48, 2.97, 3.184-3.185, 6.02, 6.47, 6.48.) It is critical to the DRC’s efforts to defeat Uganda’s argument that her troops were in Congo only in the exercise of her right to self-defence. To succeed in this effort, the DRC must show, *inter alia*, that Uganda invaded her territory *before* sufficient conditions existed to justify Uganda’s actions as lawful self-defence. In other words, the DRC must show that Uganda attacked *before* President Kabila’s military alliance with Sudan and the anti-Uganda insurgents manifested itself into a serious threat to Uganda’s security.

107. The DRC’s efforts inevitably fail, and the core of her case is revealed as hollow. Try as she might, she cannot perform alchemy on the facts. She cannot demonstrate that

Uganda invaded the DRC in August 1998 when, in fact, this did not happen.

- (1) *Uganda had no role whatsoever in the rebellion of Congolese Army units on 2 August 1998 or the failed coup d'état of the same date*

108. The war against President Kabila and his government began on 2 August 1998 with the revolt of most of the FAC units stationed in eastern Congo. (UCM, para. 45; DRCCR, para. 2.28.) The *Reply* presents no proof of any kind that Uganda had any involvement whatsoever in this watershed event. Instead, it resorts to a subterfuge that characterises the DRC's entire case against Uganda: it treats Uganda as though it were indistinguishable from Rwanda, and attributes to the former all of the actions taken (or allegedly taken) by the latter. This reflects either an ignorance of the relationship between Uganda and Rwanda, including the fact that they had widely divergent interests in the DRC, or a deliberate attempt to obscure these differences in order to sustain a bogus claim against the only State now before the Court on the merits.

109. To be sure, the *Reply* sets forth a plausible circumstantial basis on which the DRC could speculate that Rwanda (but not Uganda) might have had some involvement in, or at least foreknowledge of, the FAC rebellion. As stated in the *Reply*, "*l'ensemble du haut commandement des FAC est, en 1998, alors entre les mains des officiers rwandais. Ces derniers étaient chargés de la création d'une nouvelle armée congolaise....*"³² (DRCCR, para. 2.19.) Rwandan Army units, serving under these Rwandan officers "*constituaient les forces d'élite et le noyau dur des Forces armées congolaises,*"³³ as well as "*l'essentiel des forces de sécurité constituant le cercle le*

³² "[i]n 1998 the entire high command of the FAC was in the hands of Rwandese officers. They were in charge of forming a new Congolese army...."

³³ "constituted the elite force and the hard core of the Congolese Armed Forces,"

plus proche de Laurent-Désiré Kabila.”³⁴ (DRCR, para. 2.19 & 2.08.) The FAC was formally headed by President Kabila himself, but in fact was directed by its Chief of Staff, then Col. (now Brigadier) James Kabarebe, a Rwandan Army officer.

110. This anomalous situation, in which the Congolese army under President Kabila was directed and largely populated by officers and soldiers of Rwanda, grew out of the 1996-97 war that overthrew President Mobutu and brought President Kabila to power. That war was directed by the Government of Rwanda, and the fighting was led by thousands of Rwandan troops under the command of Col. Kabarebe. (UR Annex 16.) Upon their triumphant arrival in Kinshasa, the army of President Mobutu disintegrated, and the Rwandan soldiers filled the military vacuum. They constituted the leadership and much of the membership of the FAC until President Kabila expelled them in July 1998.

111. According to the *Reply*, Col. Kabarebe, presumably following orders from his superiors in Rwanda, betrayed President Kabila sometime in mid-1998 and set the stage for the army rebellion against him:

*[I]l est essentiel de décrire en quelques mots la manière dont le colonel James Kabarebe avait déployé les unités de l'armée congolaise dans les provinces frontalières de ces deux pays [l'Ouganda et le Rwanda]. Ce déploiement a permis de concentrer dans la région des troupes des FAC dont le colonel Karbarebe [sic] était assuré qu'elles se retourneraient contre les autorités de Kinshasa, le moment venu.*³⁵

³⁴ “the majority of President Kabila’s close security forces.”

³⁵ “[I]t is important to describe the manner in which Col. James Kabarebe deployed units of the Congolese army in the provinces which border these two countries [*i.e.*, Uganda and Rwanda]. This deployment enabled Colonel Kabarebe to concentrate the FAC troops in the region in which he was sure that they would turn against the Kinshasa authorities, at an appropriate moment.”

(DRCR, para. 2.20.) In fact, these troops did turn against the DRC Government on 2 August 1998.

112. That said, it is pure speculation on the DRC's part, unsupported by any real proof, that Col. Kabarebe deployed troops to eastern Congo in order to facilitate their revolt -- as opposed to some other reason, such as that is where, in fact, uprisings of local ethnic militias constituted the biggest security threat to President Kabila's government, and where additional FAC troops were most desperately needed.

113. Indeed, the DRC contradicts herself about why Col. Kabarebe deployed certain units of the FAC in eastern Congo. One of the sources on which the DRC purports to rely states that the FAC's 10th Brigade, which "had shown signs of anti-Kabila feeling due to alleged marginalisation" was deployed to the east "to keep them away from the capital, Kinshasa." (*How Kabila Lost His Way, supra*, p. 17.) In other words, the deployment to the east was not motivated by a desire to foment rebellion, but rather to avoid it.

114. Whether Col. Kabarebe sent the 10th Brigade to eastern Congo to promote or discourage a rebellion, the *Reply* offers no evidence that he did so in collaboration with Uganda. The FAC was controlled and populated, according to the *Reply*, by Rwandan officers and soldiers, not by Ugandans. In fact, no Ugandans served in, supervised or advised the FAC. (*See supra*, paras. 109-10.)

115. This reflected a major disagreement between Uganda and Rwanda over the DRC. As President Museveni repeatedly made clear, Uganda opposed foreign intervention in the 1996-97 war against President Mobutu because he believed the Congolese should settle their own affairs, and if they did not they would develop an unhealthy dependence on foreign powers. (UCM Annex 21, pp. 6-7, 13-15; *see also* UR Annex 46, pp. 96, 101, 102, and 105.) For the same reason, he disagreed strongly with President Paul Kagame of Rwanda about Rwandan control over the DRC's army. (*See* UCM Annex 21, p. 13.)

116. In a strained attempt to connect Uganda to Col. Kabarebe, the *Reply* includes the following statement: “*Le colonel Kabarebe est de nationalité rwandaise mais, selon certaines sources, il aurait des origines ougandaises et aurait même été ‘prêté’ par Yoweri Museveni à Kabila pour faire fonction de chef d’état-major par intérim de la nouvelle armée congolaise.*”³⁶ (DRCR, para. 2.19.) Even the authors of the *Reply* are too embarrassed to offer this entirely ridiculous rumor as “fact,” without hiding behind “certain sources” who are said to have “alleged” it. They should still be ashamed for repeating it because every DRC Government official knows that Col. Kabarebe is Rwandese, and that he was (and at all times remained) a senior officer in the Rwandan Army. (See UR Annex 16.) He had no connection of any kind to the Ugandan Government or Army and so could not have been “lent” by Uganda’s President.

117. Apart from publishing a false statement about Col. Kabarebe’s “connection” to Uganda, the *Reply* contains nothing at all linking Uganda to the FAC rebellion of 2 August 1998. Instead, and contrary to the reality on the ground, the *Reply* blindly presumes that whatever Rwanda did or knew, Uganda automatically did or knew the same. That this cannot constitute evidence is too obvious to mention. Rwanda can speak for herself about what she did or knew. Uganda, for her part, affirms that she had absolutely no involvement in, and no foreknowledge of any kind about, the FAC rebellion of August 1998.

118. Similarly, Uganda affirms that she had no involvement in or foreknowledge about the attempted coup d’état against President Kabila on 2-3 August 1998. There is no proof of any kind to support the *Reply*’s bald assertion that “*l’Ouganda et le Rwanda chargent le colonel Kabarebe de préparer un coup d’Etat contre le président Kabila.*”³⁷ (DRCR, para. 2.26.) Here

³⁶ “Colonel Kabarebe is of Rwandese nationality but, according to certain sources, he is of Ugandan origin and is alleged to have been ‘lent’ by Yoweri Museveni to Kabila to fill the post of acting army commander of the new Congolese army.”

³⁷ “Uganda and Rwanda instructed Colonel Kabarebe to organize a coup d’état against President Kabila.”

again, the *Reply* is characterised by a propensity to conflate Uganda and Rwanda, and to treat them as though they were Siamese twins, joined at the hip, rather than two different States with different interests and objectives. Moreover, Uganda was not in a position to give instructions to a senior Rwandan Army officer. Nor was he likely to accept instructions from a foreign government or army.

119. Finally, the *Reply* itself concedes that the unsuccessful coup d'état occurred when “*des soldats tutsi congolais et quelques soldats rwandais non encore rapatriés déclenchent des combats violents autour du palais présidentiel, à Kinshasa, dans une tentative de renverser le Président Kabila.*”³⁸ (DRCR, para. 2.28.) No Ugandans were implicated.

(2) *Uganda did not participate in the attack on Kitona military base*

120. A large section of the *Reply* is devoted to trying to prove Uganda participated in an attack on the Kitona Military Base, in western Congo, which allegedly began when an assault force was airlifted to Kitona from Goma, on the DRC's eastern border with Rwanda, on 4 August 1998. This is the *Reply*'s principal effort to show that Ugandan troops “invaded” Congo early in the month of August. Notwithstanding all the paper and ink expended, the *Reply* fails completely to link Ugandan troops to the attack on Kitona. In fact, no Ugandans participated in this attack.

121. The DRC's effort to link Uganda to the events at Kitona suffers, once again, from her tendency to conflate Uganda and Rwanda, and to suggest that the actions of Rwanda were equally and automatically the actions of Uganda. Of course, when the question of imputability is at stake, the Court cannot afford to be so casual. Put simply, Rwanda's actions cannot be imputed to Uganda.

³⁸ “[Congolese Tutsi] soldiers and some Rwandese soldiers who had not yet been repatriated started fighting around the Presidential Palace in Kinshasa, in an attempt to overthrow President Kabila.”

122. Another general flaw in the *Reply* is its reliance on periodical articles (and books by journalists) that fail to identify sources and that depend on multiple hearsay indistinguishable from rumor and gossip. To be sure, the *Reply* presents the statements of several purported eyewitnesses, including an alleged Ugandan prisoner of war captured at or near Kitona. However, as shown below, these “first-hand” statements are patently incredible. Take, for example, the statement of the so-called Ugandan POW named “Salim Byaruhanga.” (DRCR, para. 2.39.) No such person ever served in the Ugandan Army, or in any other agency of the Ugandan Government; nor is such a person known to the army or government. (UR Annex 107, para. 12.) Thus, whoever “Salim Byaruhanga” is -- if he exists at all -- he is not a Ugandan POW.

(a) The journalistic “evidence” cited in the *Reply*

123. Given the fact that these periodical articles, reports and books were written by journalists who were not on the scene and who do not claim to be eyewitnesses, but instead base their accounts on unnamed sources of unknown reliability, it is no wonder that they are plagued by egregious errors. A few examples will suffice to demonstrate the problem. First, at paragraph 2.42, the *Reply* cites Belgian journalist Colette Braeckman for the proposition that the UPDF was represented at Kitona by a battalion known as “NGURUMA.” The reference is incomprehensible to Uganda. There is simply no such unit in the UPDF. (UR Annex 107, para. 18.)

124. To cite a second example, the DRC quotes French academician Gérard Prunier for the purported fact that the Ugandan troops who allegedly deployed on the “western front” were “without doubt” commanded by General Ivan Koreta. Yet, General Koreta was not then and indeed never has been deployed in the DRC. (UR Annex 107, paras. 14-17.)

125. As another example, the DRC relies yet again on Mr. Prunier for the assertion that “a number” of Ugandans participated in the attack on Kitona. (DRCR, para. 2.42.) The DRC goes on to cite another source reporting that the Angolan

Army had captured “hundreds” of Ugandans, for whom the Government of the United States was forced to intercede. (*Ibid.*, citing C. Braeckman.) And then, what started out as “a number” of Ugandans in one source, and then multiplied into “hundreds” of prisoners in another, finally became a “thousand” captives in still another journalistic account proffered by the DRC. (*Ibid.*, citing *La lettre de l’océan indien*.)

126. The exponential increase in the number of Ugandans purportedly captured at Kitona, and the expansion of involved parties to include Angola and the United States, highlights the caution with which the Court should receive all such journalistic, and other third- fourth- or fifth-hand accounts. As the Court observed in the *Nicaragua* case: “Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source.” (ICJ Reports, 1986, p. 41, para. 63.) Surely, if there had been “hundreds” or “thousands” of captured Ugandans, and if they had been observed by the Angolan Army and the Government of the United States, the DRC could have (and should be required to have) produced more credible evidence of their existence.

(b) The “first-hand” accounts

127. Like the inherently unreliable reporting on events the authors did not even purport to witness, the so-called “first-hand” information the DRC offers in connection with the Kitona matter is woefully inadequate. A close analysis makes clear that it is insufficient to impute to Uganda participation in the attack.

128. Before addressing the individual statements, it is worth noting, in assessing their value as “evidence,” that they were obtained by the DRC’s notorious military intelligence service, the *Detection Militaire des Activités Anti-patrie* (“DEMIAP”). (*See, e.g.*, DRCR Annexes 57-59.) According to the United States Department of State, this security force is known to have committed “numerous, serious human rights abuses.” (U.S. Dept. of State, *Human Right Practices for 1998: Democratic*

Republic of Congo Country Report (Feb. 1999).) The DEMIAP's methods were confirmed by Amnesty International: "The security forces tortured unarmed civilians suspected of supporting opposition forces or to settle old scores. Journalists were particularly targeted. Methods included whippings and beatings with belts or metal tubes. Conditions of detention often amounted to cruel, inhuman or degrading treatment." (*Amnesty International Report 2002: Democratic Republic of the Congo*, p. 2.) Uganda questions whether any statements extracted by an agency like the DEMIAP can be treated as reliable evidence by the Court.

129. Even setting aside the inherent credibility problems associated with statements extracted by the DEMIAP, the first-hand accounts offered by the DRC suffer from still other fatal flaws. For example, the statement of one Issa Kisaka Kakule, who purports to have been a member of the FAC's 10th Battalion, relates that he allegedly saw one battalion of Ugandan troops at the Goma airport preparing to go to Kitona, although he fails to provide any dates. (DRCR Annex 59.) His declaration refers to particular Ugandan officers by name and states that he had previously fought alongside many of them in the war to oust President Mobutu. The problem is that the UPDF officers mentioned by Mr. Kakule do not exist. There have never been any such officers (or enlisted personnel) in the UPDF. (UR Annex 107, paras. 5-8, 11.) Nor did the UPDF participate in the war against President Mobutu. (*Infra*, paras. 162-66.) Plainly, Mr. Kakule's statement provides no basis for the Court to find any facts.

130. The DRC also offers the statement of Commander Mpele-Mpele, who says that he saw a group of foreign soldiers at Kitona in early August 1998. (DRCR Annex 61.) Among the soldiers he claims to have observed were a group "*différents des autres... un peu éloigné du groupe [qui] parlaient Anglais.*"³⁹ (*Ibid.*) He concludes that these "different" soldiers must have been Ugandan, based not on any direct knowledge, but because they were speaking English. (*Ibid.*)

³⁹ "different from others... kind of separate from the rest of the group and spoke English."

131. Commander Mpele-Mpele's conclusion that some of the foreign soldiers at Kitona were Ugandans because they spoke English is unsupportable. Ugandans are not the only ones in East or Central Africa who speak English. In fact, hundreds of thousands of Rwandans, including many contingents of the Rwandan Army, were born and raised as refugees in anglophone countries, including Tanzania and Uganda, and now speak English rather than French. Rwanda's President, Paul Kagame is an English-speaker, not a Francophone. Indeed, if speaking English were conclusive of Ugandan nationality, then current DRC President Joseph Kabila would be Ugandan because he grew up in exile in East Africa speaking English, not French. (UR Annex 47.)

132. The DRC also cites the statement of one José Dubier, a pilot, who allegedly flew Ugandan troops from Goma to Kitona in early August 1998. (DRCR, para. 2.35.) Yet, a careful reading of Mr. Dubier's statement (taken under DEMIAP watch) reveals no such facts. Mr. Dubier claims only to have seen Ugandans at a hotel in Goma when the 2 August 1998 rebellion broke out, but specifically states that that he does not know whether any Ugandans were among the troops he ferried to Kitona. (DRCR Annex 59.) Moreover, Mr. Dubier does not state how he was able to differentiate the Ugandans he purportedly saw in the Goma hotel from any Rwandans who might have been there. Given that so many Rwandan soldiers are primarily English speakers, language alone could not have helped him distinguish one from the other. The Court is thus left to take his statement on faith, not facts. However, Mr. Dubier's eagerness to please his DEMIAP interrogators makes it difficult to trust his objectivity and independence: "*Mon souci est que ... les agresseurs rentrent chez eux car c'est une guerre injuste. Que la communauté internationale pointe une fois pour toute du doigt les véritables coupables.*"⁴⁰ Whatever this statement represents, it is not the testimony of an unbiased witness.

⁴⁰ "My wish is that ... the aggressors go back to their countries for it is an unjust war. That the international community point a finger once and for all at the real culprits."

133. The last purported first-hand account of the Kitona operation offered by the DRC is the statement of one Viala Mbeang'Ilwa. (DRCR Annex 62.) Mr. Mbeang'Ilwa claims to be a pilot whose plane was commandeered to fly Ugandan and Rwandan troops from Goma to Kitona on 2 August 1998. Like the other statements cited in the *Reply*, however, it provides no credible basis for imputing to Uganda responsibility for the attack on Kitona.

134. The witness is obviously confused about the nationality of the troops he allegedly flew to Kitona. In the first paragraph of his statement, he refers to Rwandan, Ugandan and *Burundian* "aggressors." Yet, the alleged Burundians never reappear in his narrative (nor in any of the other statements). If he cannot keep his story straight about the Burundians, his statements about the alleged Ugandans cannot be credited either. Moreover, the statement is replete with distinctly non-factual slurs that negate the witness' impartiality and objectivity. For example, in referring to the types of planes used in the operation, he states: "*Pour cette sale bésogne [sic], les agresseurs disposaient le type d'apareils suivant...*"⁴¹ Similarly, Mr. Mbeang'Ilwa demands of "*ces malfaiteurs un dédommagement de \$1.500.000.*"⁴² These passages reveal more about the declarant's motivations than the events that actually took place.

135. Finally, Mr. Mbeang'Ilwa claims to know that some of the troops were Ugandan because, while drinking beer with him, they told him all about their secret military plans (*i.e.*, to topple the Congolese Government within ten days). This gives new meaning to the word "absurd." What army, worthy of the name, blithely shares its most sensitive military battle plans and political objectives over beer with a complete stranger, let alone a captured pilot from an "enemy" State hijacked at gun-point? Certainly not Uganda's. Mr. Mbeang'Ilwa's statement is so far-fetched that it cannot serve as a basis for imputing responsibility to Uganda.

⁴¹ "For this dirty type of job, the aggressors had the following types of planes...."

⁴² "these wrongdoers damages worth \$1,500,000."

136. The final “witness” tendered by the DRC is Hon. Aggrey Awori, a well-known opposition politician in Uganda with strong anti-government biases. His press statements about an alleged visit with Ugandan POWs in the DRC were nothing more than an exercise in creative politicking, designed to shore up his failing presidential election campaign against incumbent President Museveni by embarrassing the Ugandan Government and the President in particular. (UR Annex 45.)

137. There can be no other explanation for Mr. Awori’s public declaration in Kampala that the DRC held not one Ugandan POW, but *one hundred forty-three* Ugandan POWs. According to a contemporaneous account of Mr. Awori’s press conference:

Presidential aspirant Aggrey Awori arrived in the country yesterday and officially announced his candidature for the 2001 presidential elections.

Addressing a press conference at the International Conference Centre later in the afternoon, Awori, also MP for Samia Bugwe North, revealed that during his three month stay in the USA, [he] traveled to Congo and established that 143 Ugandan soldiers are being held captive by the Kabila government.

“I visited Congo and met President Kabila. I was shocked to find 143 Ugandan prisoners of war being held captive in Congo. I have evidence here”, Awori said showing pictures which he said he took while in Congo.

(*Ibid.*)

138. In fact, this was a total fabrication. There were no Ugandan prisoners of war held by the DRC then, or at any other time. Upon examination of the photographs tendered by Mr. Awori, the Government of Uganda confirmed, and hereby

reaffirms, that none of the individuals depicted in them were Ugandan soldiers; nor were they otherwise known to the Ugandan Government or Army.

139. The *Reply* neglects to mention that Mr. Awori, its “star” witness, claimed there were 143 Ugandan POWs in the DRC (exactly 142 more than the number claimed by the DRC herself). This is understandable. Mr. Awori might just as well have claimed he saw flying saucers, for all his statement revealed about his credibility. Moreover, even the one Ugandan POW the DRC claims Mr. Awori visited, the alleged Salim Byaruhanga, is one more than there actually were. The UPDF did not then and does not now have a soldier in its ranks by the name of Salim Byaruhanga. (UR Annex 107, para. 12.) Thus, the POW Mr. Awori allegedly visited is a figment of somebody’s imagination.

140. Nevertheless, the DRC asserts that Mr. Awori videotaped his visit with “Mr. Byaruhanga” so he could present evidence of the captured prisoner to the Ugandan Parliament. (DRCR, para. 2.39.) Yet, the DRC nowhere suggests that Mr. Awori ever presented a video or other evidence of his “findings” to the Parliament or to anyone else. In fact, he did not. Although he announced in Uganda that he had tapes of conversations with Ugandan POWs in the DRC, he repeatedly refused all requests -- from Ugandan Government and opposition sources alike -- to produce them. Surely, if the facts had been as he alleged, he -- and more importantly the DRC -- would have (and should be expected to have) come up with more than a statement about a fictitious interview with a non-existent Ugandan soldier.

141. Uganda’s Ambassador to the DRC, Dr. Bataringaya, has further confirmed that there were no Ugandan soldiers taken prisoner at Kitona or elsewhere in August 1998:

23. That it has come to my attention that the DRC claims to have captured Ugandan soldiers who allegedly participated in the attack launched by Rwanda in Western Congo in early

August 1998. As Uganda's Ambassador to the DRC at the time, it was my duty to know about all such matters.

24. That there were no Ugandan military prisoners taken at the time of Rwanda's early August push towards Kinshasa. The only Ugandans of which I am aware who were made prisoner at the time were two Ugandan businessmen.⁴³ But these were categorically not Ugandan military personnel.

(UR Annex 87, paras. 23-24.)

(c) The alleged "Ugandan" tank

142. The DRC claims to have seized an abandoned tank used in the Kitona attack. The *Reply* alleges the tank is Ugandan because it is the same model as a tank used later by Congolese rebel leader Jean-Pierre Bemba, who allegedly received his tank from Uganda. (DRCR, para. 2.40.)

143. The tank allegedly seized by the DRC near Kitona is not, and cannot be, Ugandan, because Uganda did not participate in the Kitona attack. The tank, if it exists, might very well be similar to one used by Jean-Pierre Bemba, or to tanks maintained by the UPDF in Uganda. If so, it is similar to the tanks that belong to the Rwandan Army and to tanks belonging to the DRC. Neither Uganda, Rwanda nor the DRC manufactures their own tanks. All purchase their tanks from abroad, and all have purchased T-55 tanks from Russia. Thus, the "discovery" of a T-55 tank near Kitona constitutes no proof whatsoever against Uganda. It is just as likely to have belonged

⁴³ The correspondence from the International Committee of the Red Cross (ICRC) cited in the *Reply*, which speaks of "Ugandan nationals" and "Ugandan citizens" held prisoner in the DRC, relates to these civilians. The ICRC correspondence nowhere refers to the Ugandans as soldiers or military personnel. (DRCR Annex 67.)

to Rwanda, the DRC, or even to the DRC's allies, Angola or Zimbabwe, who also sent troops (and tanks) into the DRC, and who also acquired tanks from Russia.

* * *

144. Jean-Pierre Bemba, who is cited by the DRC throughout the *Reply* as an authoritative source on Uganda's military activities in Congo, confirms that the Kitona operation was strictly a Rwandan and Congolese rebel affair. In his book, he writes:

*En août 1998, une partie des ex-FAZ cantonnés à Kitona assiste à l'atterrissage d'un boeing de la compagnie privée Congo Airlines. Cent trente commandos rwandais et une vingtaine de Congolais neutralisent la base militaire. Deux jours plus tard, un pont aérien s'organise entre Goma et le Bas-Congo....L'entrée en scène inattendue des troupes angolaises et zimbabwéennes ruine les espoirs rwandais. Le colonel James Kabarebe qui a conçu toute l'opération décide de dérocher de Kinshasa et du Bas-Congo....Les troupes rwandaises et leurs alliés congolais passeront trois mois dans le maquis angolais.*⁴⁴

(UR Annex 46, p. 25.) Mr. Bemba's consistent reference to Rwandan and Congolese soldiers, and his conspicuous failure to mention Uganda, confirm what Uganda has declared to the Court: that she had no participation in the Kitona attack.

⁴⁴ "In August 1998, some EX FAZ at Kitona assisted in the landing of a Boeing belonging to a private Congolese company airline. One hundred and thirty (130) Rwandese commandos and about 20 Congolese neutralised the military base. Two days later, an aerial link was set up between Goma and lower Congo....The unexpected arrival of Angolan and Zimbabwean troops ruined the hopes of the Rwandese. Colonel James Kabarebe, who had planned the whole operation, decided to withdraw from Kinshasa and lower Congo....The Rwandan troops and their Congolese allies spent three months in the Angolan bush."

(3) *Uganda did not participate in the attack on Kindu*

145. Curiously, the DRC devotes considerable energy attempting to show that Uganda participated in the effort to capture the town of Kindu in October 1998. (DRCR, paras. 2.49-2.53.) The reasons for the DRC's rhetorical investment are not entirely clear. Because Kindu fell in *October* 1998 -- a fact admitted by the DRC (DRCR, para. 2.50) -- the relevant events occurred long after the necessary conditions existed to justify Uganda's self-defence.

146. As best Uganda can determine, the DRC's efforts with respect to Kindu appear intended to show that Uganda was deployed in the south of the Congo, and thus that she was interested in more than securing key strategic sites adjacent to her own border. Yet, in the end, the DRC's discussion of Kindu is an exercise in futility. As she has always maintained, Uganda was not there. (UCM, para. 261.)

147. Uganda observes in the first instance that the DRC's contentions concerning Kindu are based largely on inference and conjecture. According to the DRC, the UPDF must have been there because an attack on Kindu "*s'inscrit dans la logique de la stratégie ougandaise ...*"⁴⁵ (DRCR, para. 2.51.) It goes without saying, of course, that such supposition is insufficient to impute responsibility to Uganda for anything that took place at Kindu.

148. Uganda also notes that the DRC has not offered evidence from any of her military personnel who can claim to have seen UPDF soldiers in the area of Kindu. The FAC convened a special Congolese Military Commission in November and December 2001, specifically for the purpose of gathering facts for this case. (See DRCR Annex 46.) According to the minutes of what appears to have been the first session: "*Général KAYEMBE avait précisé à l'intention de l'assemblée que ces différentes scéances de travail avaient pour but d'étayer la thèse du Gouvernement de la RDC devant la*

⁴⁵ "is in line with the logic of Uganda's strategy ..."

cour internationale de Justice de la HAYE dans l'affaire l'opposant à l'Ouganda..."⁴⁶ (*Ibid.*) Nevertheless, the DRC has not brought forth a single member of those working sessions to attest to the presence of Ugandan forces at Kindu. The best it can do is the testimony of one Oleko Yemba who stated only "*[n]ous apprendrons que deux bataillons Ougandais avec une colonne des chars et des éléments rebelles congolais avec à leur tête le Major NGIZO étaient en progression vers KINDU.*"⁴⁷ (DRCR Annex 58; emphasis added.) Thus, the "witness" admitted having no personal knowledge. But not only is this would-be fact based on hearsay of the most obvious kind, it contains no hint that Ugandan troops ever actually arrived in Kindu. Moreover, there is not and never has been a UPDF officer named "Ngizo." (UR Annex 107, para. 9.) Under the circumstances, this statement cannot be taken seriously.

149. The only other so-called evidence the DRC offers is a statement of one Tshomba Fariala, a Congolese shop-owner. (DRCR, para. 2.52.) But this statement too is unreliable. First, like most of the other "witness" statements offered by the DRC, this statement was taken under the watchful eye of the notorious DEMIAP. (DRCR Annex 60.) Second, the DRC's characterisation of the statement and the statement itself are sharply inconsistent. The DRC appears to make up facts that are just not in the text of the document itself. (*Compare* DRCR, para. 2.52 *with* DRCR Annex 60.) Thus, while the *Reply* refers to Mr. Fariala as providing hotel accommodations to Ugandans, and to Ugandans eating in his restaurant, his statement says nothing of the sort. (*Ibid.*) Nor, unlike the *Reply*, does the statement say anything about Ugandans staying behind to protect the port and airport in Kindu. (*Ibid.*)

⁴⁶ "General KAYEMBE informed the assembly that the different working sessions are meant to discuss the preparation of evidence to back the Government of the DRC's claim in the International Court of Justice of the Hague in the case between the DRC and Uganda...."

⁴⁷ "[w]e learnt that two Ugandan Battalions with a column of tanks and Congolese rebels under Major NGIZO were advancing towards KINDU."

150. Mr. Fariala's statement, as recorded by the DEMIAP, does allege that "Ugandans" confided to him their confidential strategic plans to overthrow the DRC Government. In this regard, the statement is suspiciously similar to -- and just as incredible as -- the one attributed to pilot Viala Mbeang'Ilwa. (See *supra*, paras. 133-35.) Both statements would have the Court believe the unlikely proposition that the UPDF voluntarily disclosed classified national security information of the most sensitive order to a native shop-keeper (or a hijacked pilot) in hostile territory. Such patently dubious testimonies cannot overcome Uganda's denial of her presence in Kindu.

151. In any event, by the DRC's own admission, this did not occur in August 1998, but in October. Hence, the allegations concerning Kindu cannot support the DRC's thesis that Ugandan troops "invaded" the DRC in August, before the threats to Uganda's security justified her military intervention.

(4) *Uganda did not send troops into the DRC in August 1998*

152. Another element in the DRC's strained effort to establish a "Ugandan invasion" in August 1998 is the allegation that Uganda sent additional troops into eastern Congo during that month. This is false. The only Ugandan troops in the DRC at the time were the three UPDF battalions that had been stationed across the border, with the Congolese Government's consent, since September 1997. Uganda sent no new troops into the DRC in August 1998.

153. The DRC's allegations are not even borne out by the "evidence" relied on by the *Reply*. At paragraph 2.55, for example, the DRC contends: "*Après la rébellion de la 10^{ème} Brigade des FAC, une colonne de l'UPDF composée de chars et d'autres véhicules a en effet pénétré sur le territoire de la RCD par le poste frontalier de Kasindi, situé au sud-est de la province du Nord-Kivu. Cette colonne a fait mouvement vers la ville de Beni, chef-lieu du territoire de Beni.*"⁴⁸ Yet, the

⁴⁸ "After the rebellion of the 10th brigade of the FAC, a group of UPDF made of military tanks and other vehicles entered the DRC's territory by the

supposed evidence for these allegations, the statement of Commander Mwimba Neliangwe, says no such thing. (DRCR Annex 53, p. 4.) There is absolutely no mention of any border crossing in August, or at any other date, in this statement. (*Ibid.*)

154. Similarly, the DRC argues at paragraph 2.60 of the *Reply* that “[u]ne fois la ville de Bunia conquise, d’autres contingents de l’UPDF ont pénétré, le 13 août 1998 vers 16 heures, sur le territoire du Congo au nord-est de Bunia par le poste frontalier d’Aru.”⁴⁹ This time, the DRC cites three different annexes as supporting these so-called facts. (DRCR Annexes 48, 51, 53.) However, none of the referenced statements mentions anything about “other contingents of the UPDF” penetrating Congolese territory through the Aru border post (or any other location) at any time. (*Ibid.*) As indicated at paragraph 101 above, one of the UPDF battalions that was long stationed in the DRC redeployed to Bunia on 13 August 1998 “without fighting.” (DRCR, para. 2.59.) However, there was no border crossing by Ugandan troops at Aru or any other location.

155. Thus, there is no evidence whatsoever that Ugandan forces entered the DRC in August 1998. There is nothing in the *Reply*, or any of the earlier pleadings filed by the DRC, that contradicts Uganda’s affirmation and evidence that she did not send her armed forces into Congo until mid-September 1998. In particular, the documentation of the UPDF High Command’s decision to send troops into the DRC dated 11 September 1998 (UCM, para. 53 & Annex 27) constitutes irrefutable proof that Uganda’s actions in the DRC were undertaken long after the rebellion against the Congolese Government had broken out in August (without Ugandan participation) and only after it had become clear that Uganda’s security was seriously and imminently at risk.

Kasindi border post, which is situated in North Kivu Province. This group moved towards Beni, the capital of Beni territory.”

⁴⁹ “[o]nce Bunia had been conquered other contingents of the UPDF penetrated on 13th August 1998 towards 16.00 hours, Congo’s territory to the northeast of Bunia through the Aru border post.”

(5) *Uganda did not participate in the formation of the RCD*

156. The last element offered by the DRC as “proof” of Uganda’s early intervention against the Congolese Government is the allegation that Uganda, along with Rwanda, created the rebel organisation known as the Congolese Rally for Democracy (“RCD”). (DRCR, paras. 2.108, 2.130.) Yet again, however, the *Reply* (and the third-hand sources it quotes) suffers from the tendency to conflate the activities of Rwanda and Uganda. Whatever role Rwanda may or may not have had in the formation of the RCD, Uganda was not involved. As Uganda has already amply demonstrated, she was not involved in planning or executing the August 1998 rebellion, and did not supplement her troops in the DRC until mid-September. (*Supra*, paras. 87, 101-03, 108-19.) She was thus in no position to assist in the creation of an internal Congolese opposition force.

157. As elaborated further below, it was only *after* the rebellion had broken out and *after* the RCD had been created that Uganda began to interact with the RCD, and even then, Uganda’s relationship with the RCD was strictly political until after the middle of September 1998. (*Infra*, paras. 183-92.) Thus, Minister of State for Defence Amama Mbabazi testified to the Porter Commission:

Lead Counsel:

Are you aware if we gave any active support to the RCD rebels during our stay in the Congo?

Amama Mbabazi:

Subsequently.

Lead Counsel:

Subsequently?

Amama Mbabazi:

Yeah.

Lead Counsel:

What would be the nature of that support we gave?

Amama Mbabazi:

Well, immediately after the rebellion broke out, as I said, the region tried to find an answer -- tried to resolve the problem. So meetings were held and we helped the RCD in the process of negotiations: I mean, on positions that were being presented, on ...; giving them technical expertise in these areas -- in the field of negotiations. Of course, subsequently, they also developed internal strife and we tried to bring them together; and, as you know of course, they eventually

Justice Porter:

What Mr. Shonubi is specifically trying to ask you is whether any military assistance was given to the RCD. Is that right Mr. Shonubi?

Lead Counsel:

That is correct, My Lord.

Amama Mbabazi:

Oh! Not at the beginning, no.

(UR Annex 65, Part B, pp. 24-25.) From this, at least two things are clear. First, Uganda's initial interaction with the RCD was political only, not military, and was intended to

promote a negotiated political solution to the crisis in the DRC. Second, when Uganda began to counsel the RCD to seek a political solution, the organisation was already in existence; Uganda had no role in its creation.

158. The *Reply* cites only journalistic sources in support of its allegation that Uganda created the RCD. (See, e.g., DRCR, para. 2.130.) Based on nothing more than these dubious “authorities,” the DRC asserts that the RCD had a joint high command made up of Ugandans, Rwandans and Congolese, under the leadership of the UPDF Chief of Staff. (DRCR, para. 2.108.) Typically, the journalists who published this statement failed to identify their source or any other facts on which it could be supported. Nor did they report when the so-called “joint high command” came into existence, *i.e.*, during August 1998 or later. In any event, Uganda denies any knowledge of or participation in any such “joint high command,” if it existed at all.

159. The *Reply* also cites a journalistic source for the proposition that “[d]ès le début de la mutinerie d’une partie de l’armée congolaise, le 2 août, les mutins et leurs parrains rwandais et ougandais se sont mis à la recherche de personnalités susceptibles de civiliser et de ‘congoliser’ le coup de force.”⁵⁰ (DRCR, para. 2.130.) Citing the same source, the *Reply* alleges that the RCD was created to “servir de nouvelle vitrine politique aux militaires tutsis et à leurs alliés rwando-ougandais.”⁵¹ (*Ibid.*) No underlying facts of any substance are provided in support of these bald assertions, which constitute nothing more than the *opinions* of the authors, who themselves are of unknown partisanship or interest. The usual cautions associated with journalistic reports apply with extra force to such conclusory statements.

⁵⁰ “[r]ight from the beginning of the mutiny which was staged by a section of the Congolese army on 2nd August, the mutineers and their Rwandese and Ugandan godfathers started looking for people who could make the people accept the mutiny and Congolise it.”

⁵¹ “serve as a new political opening to the [Congolese Tutsis] soldiers and their Rwanda-Ugandan allies.”

160. Finally, the DRC and her sources again demonstrate an incurable affliction for conflating Rwanda and Uganda, and for assuming that whatever Rwanda did, Uganda necessarily followed along in lockstep. There is nothing in the “evidence” presented by the DRC, however, to justify such a presumption. With respect to the particular allegation that Uganda created the RCD, Uganda has shown that she did not participate in the FAC rebellion of August 1998 or send her troops into Congo at that time. (*Supra*, paras. 87, 101-03, 108-19.) She thus had no need to find “cover” for a then non-existent intervention, and no motive for creating the RCD. In short, the DRC’s unreliable journalistic sources (which do not merit the label “evidence”) cannot overcome Uganda’s denial of participation in the creation of the RCD.

E. The DRC’s Failure To Establish A Motive For Uganda’s Military Presence In The DRC Other Than Self-Defence

161. In an effort to rebut Uganda’s showing that she deployed additional troops in the DRC only for the purposes of self-defence, the *Reply* makes a considerable effort to show that Uganda had other motives for her actions. The DRC argues, for example, that Uganda’s actions were motivated by a desire to dictate the course of Congolese affairs, or to “exploit” the DRC’s natural wealth, or even just because Ugandan President Museveni had grown personally displeased with President Kabila. (DRCR, paras. 2.08-2.15.) The DRC’s efforts are, however, deeply flawed, not least by the ever-present tendency to “lump” Uganda and Rwanda together and view them as one. In fact, nothing in the *Reply* shows that Uganda’s intervention in the DRC was motivated by anything other than the determination that such action was necessary to defend herself against grievous and imminent threats to her security.

162. The *Reply*’s contention that Uganda moved into the DRC for political reasons hinges on the argument that Uganda participated militarily in the 1996-97 war to overthrow President Mobutu. The DRC seeks to use this would-be fact as “proof” of Uganda’s willingness to use force to determine the course of Congolese domestic affairs, and to establish that

Uganda was somehow accustomed to viewing President Kabila's regime as an instrumentality of the Ugandan State. This theoretical argument about Uganda's motives is thoroughly contradicted by the facts.

163. Indeed, the evidence shows that Uganda deliberately declined to intercede militarily when Mr. Kabila's AFDL movement, backed by the Rwandan Patriotic Army, rose up in arms against President Mobutu. (*See* UCM, para. 27 & Annex 21.) While Uganda offered moral support to the AFDL, and while she was not unhappy to see President Mobutu leave the scene, she refused to use her military as an instrument for affecting the internal affairs of another State. Indeed, the evidence shows that President Museveni, far from favoring a military solution to the problems in Congo, counseled Mr. Kabila to negotiate a political solution with President Mobutu. Mr. Kabila rejected President Museveni's advice and, with the full military backing of Rwanda, brought down the Mobutu government. (UCM Annex 21; UR Annex 46, pp. 101, 102.)

164. Uganda's non-participation in the war against President Mobutu is confirmed by numerous witnesses with direct knowledge. For example, in his sworn testimony before the Porter Commission, Hon. Stephen Kavuma, Uganda's Minister of State for Defence during the period in question stated:

Yes, My Lords, I want to be very clear on this[.] I talked about, Uganda being interested in a stable Zaire at [the] time [of the AFDL rebellion]. What I want to make absolutely clear is that our support was moral, was moral at that stage. It was not involving troops going to actively participate in the changes that removed Mobutu[.] But we morally would support forces which wanted to see positive change taking place, specially if they would result into the stable Zaire that would cease to be a source of problems to Zaire itself and the region including Zaire's neighbours.

(UR Annex 59, Part F, p. 4.)

165. These facts were confirmed by three other witnesses (1) Hon. Amama Mbabazi, Uganda's current Minister of State for Defence; (2) Dr. Kamanda Bataringaya, then and current Ambassador to the DRC, and (3) Lt. Col. Andrew Lutaya Lugobe, the sole Ugandan soldier who participated in the war against President Mobutu. (Lt. Col. Lugobe had been sent by Uganda to Rwanda to assist with anti-smuggling operations. He participated in the anti-Mobutu struggle at the specific request of Rwanda's then-Vice President and Minister of Defence and current President Paul Kagame.) For the sake of brevity, rather than quote those statements here, Uganda simply refers the Court to the attached Annexes. (See UR Annex 65, Part A, p. 15; UR Annex 66, pp. 1-5; UR Annex 61, pp. 4-5.)

166. If any additional confirmation were required, it has been provided by no less an authority than President Kagame of Rwanda. In an interview given to the *Washington Post* in July 1997, shortly after the installation of Laurent Kabila as President of the DRC, President Kagame:

acknowledged for the first time his country's key role in the overthrow of president Mobutu Sese Seko in neighboring Congo, saying that the Rwandan government planned and directed the rebellion that toppled the longtime dictator and that Rwandan troops and officers led the rebel forces.

....

...Kagame's account suggests that the war, which began in the eastern Congo near the borders of Rwanda and Uganda, was planned primarily by Rwanda and that the plan to remove Mobutu originated in Kigali as well.

....

[Rwanda's] third goal was broader -- toppling Mobutu. Kagame said, "it would have been more suitable" if Congolese rebels had done most of the fighting against Mobutu's troops, but it also would have been riskier.

"I don't think they were fully prepared to carry it out alone," he said. "We did continue to take some role because we thought doing it halfway would be very dangerous. We found the best way was to take it to the end." The Rwandans were backed in this final aim by Angola, which also contributed troops and arms to the rebels and pushed the rebels to take Kinshasa.

(UR Annex 16.)

167. Unlike Rwanda, Uganda did not help put President Kabila in power. She thus never had reason to count on "*la docilité et la gratitude du nouveau président congolais.*"⁵² (DRCR, para. 2.08.) Nor did Uganda follow Rwanda's lead in establishing, leading and filling the ranks of the DRC's new army. (*Supra*, paras. 109-10.) No UPDF officers or enlisted men served in the FAC, nor did Uganda manifest an interest in involving herself in the FAC or in other internal Congolese matters. Accordingly, the DRC has not shown that Uganda had either motive or inclination to exercise political or military domination over President Kabila and his government. Put simply, the DRC has failed utterly to support her argument that Uganda decided to intervene in Congolese internal affairs because she could not tolerate President Kabila's "independence."

168. Likewise, the DRC has failed to show that Uganda sent her troops into eastern Congo in September 1998 because of President Museveni's personal pique with his Congolese

⁵² "the docility and gratefulness of the new Congolese president."

counterpart. (DRCR, paras. 2.12-2.15.) Indeed the mere suggestion in the *Reply* that Uganda's President took the momentous decision to go to war and to risk the lives of thousands of UPDF soldiers over a personal squabble with President Kabila is contemptible, and merits no response. As amply demonstrated in the *Counter-Memorial*, and reiterated above, it was only when President Kabila licenced Sudan to station troops and occupy all major airfields in eastern and northeastern Congo, and to step up support for the ADF and other insurgent groups attacking Uganda, that President Museveni and the UPDF high command took the difficult decision to cross into the DRC and drive the Sudanese out of that country. (UCM, paras. 38, 52; *supra*, para. 87.)

169. Uganda's demonstrated need to act in self-defence in the face of the serious threat to her security posed by the DRC/Sudan/ADF military alliance also negates the DRC's argument that Uganda's actions were driven by economic interests. This argument is refuted at length in Chapter IV, *infra*. As shown therein, the DRC's claim of "economic exploitation" by Uganda is nothing more than a *post hoc* effort to distract the Court from the simple fact that Uganda's one and only interest in sending her troops into Congo was defence of her security.

170. In addition to attributing to Uganda non-existent motivations for her military intervention in eastern Congo, the DRC falsely labels Uganda's presence there an "occupation." (See, e.g., DRCR paras. 2.77-2.85.) But the notion of a Ugandan occupation is manifestly absurd. At the height of its deployment in the DRC, the UPDF maintained fewer than 10,000 soldiers in that country.⁵³ (See UR Annex 60, Part A, p. 17-18 & Part B, p. 1.) These were confined to the regions of eastern Congo adjacent to the Uganda border and to designated

⁵³ The absurdity of 10,000 Ugandan troops "occupying" the DRC is highlighted in the Annexes the DRC has appended to her *Reply*. The All Party Parliamentary Group on the Great Lakes and Genocide Prevention Report, *Visit to Democratic of the Congo 2nd - 6th August 2001* (DRCR Annex 75), states: "Given the vast size of the DRC, if the UN deployed the same density of troops-to-land as it did in Kosovo, it would require 10 million UN peacekeepers!" (*Ibid.*, p. 3; emphasis added.)

strategic locations, especially airfields, from which Uganda was vulnerable to attack by the DRC and her allies, especially Sudan.

171. Compared to other foreign forces in the DRC, the UPDF's presence was minimal. According to MONUC,⁵⁴ Uganda actually had the *fourth* largest contingent of foreign troops in the DRC, far behind Rwanda (which had 23,400 soldiers in Congo), Zimbabwe and Angola, the last two of which were allies of the DRC Government. (UR Annex 90.) Uganda's troop presence also paled by comparison to the Congolese rebel organisations that came to exercise control over eastern Congo. According to the *Reply*, Jean-Pierre Bemba's Mouvement pour la Liberation du Congo ("MLC") had 33 battalions (more than 25,000 troops) under its command. (DRCR, para. 2.114.)

172. Under the best of circumstances, it would, of course, be impossible for such a small contingent of Ugandan soldiers to "occupy" a region roughly the size of Germany (and the densely forested, virtually roadless and completely undeveloped eastern Congo hardly presented the "best of circumstances").

173. Uganda's limited military presence in the DRC was explained by Hon. Stephen Kavuma in his sworn testimony to the Porter Commission:

Justice Porter:

Can we turn this the other way round? When the UPDF went into the Congo, to deal with this security problem, they must have had some limits. You don't go further than so and so. I can't believe that Uganda would send armed troops into another country without some sort of limit. So, what was the limit?

⁵⁴ "MONUC" is the United Nations Observer Mission in the DRC. It was created by the U.N. Security Council in August 1999 to help implement and monitor compliance with the Lusaka Agreement.

Mr. Kavuma:

My Lords, when the troops went to the Congo, they were primarily interested in controlling the areas from where trouble was emanating to come to Uganda. And these were close to our borders. But then the situation kept on developing, where information was coming in, as to the possibility of other sources of trouble, further from the border could cause problems to this country. My Lords, communication is a matter of great difficulty in this part of the DRC, but there are many airfields scattered all over the place, and information kept coming, that forces that were troubling Uganda were intending to use these airfields, to prosecute their intentions against this country, so troops kept moving further and further from their original positions, near the borders with Uganda.

Justice Porter:

So, there was no limit?

Mr. Kavuma:

My Lords, I think the limit was now being determined by the areas where assessment had been made that....

Justice Porter:

By the troops on the ground? By the senior commanders on the ground?

Mr. Kavuma:

By the security system, My Lords, that more areas further from the border positions from

where the troops originally were, had become potential threats to this country, and in some cases actual threats to this country. Having secured these sites, the nature of Ugandan deployment changed with Lusaka.

(UR Annex 59, Part A, pp. 17-18.)

174. Similarly, Minister Kavuma testified:

Justice Porter:

Yes, that is right. I think we worked out that Gbadolite was actually 1500 km from the Uganda border; and we were surprised that the UPDF would be there!

Mr. Kavuma:

No, I am not surprised, My Lord, because we continued, as I said earlier, we continued receiving reports of possible attacks from airports and airfields from all these other places. Gbadolite has a very, very big airfield with a long runway, it can be used by very sophisticated and big fighter planes. We could not take chances so we had to occupy it to preempt that likely development. And of course, My Lords, flying 1000 km is not (is no longer) a very difficult thing these days. So in terms of proximity, Buta, in terms of modern warfare, rather Gbadolite, in terms of modern warfare, could be as close as anything near to our border.

(UR Annex 59, Part C, p. 5.)

175. Thus, starting on 20 September 1998, the UPDF began to seize the airfields in eastern and northeastern Congo to prevent the DRC and Sudan from using them to attack Uganda or resupply the ADF and other anti-Uganda insurgent groups

that were stepping up their operations in the area. One by one, the UPDF took over the airfields at Isiro (20 September), Buta (3 October), Bumba (17 November), Lisala (12 December), and eventually Gbadolite (3 July 1999), as depicted by the map on the following page of this *Rejoinder*. En route, there were various conflicts with Sudanese, Chadian, ADF/WNBF, and ex-FAR/Interahamwe armed forces allied with the DRC Government. The major military engagements are listed in the *Counter-Memorial*.⁵⁵ (UCM, para. 54.)

176. The fighting in and around Gbadolite in July 1999 marked the last major clash between Uganda and the DRC-allied forces. Having driven the Sudanese forces out of the DRC and denied her enemies access to the last major airbase in northern Congo, Uganda achieved her objective in moving into the DRC. From that point forward, Uganda was no more than marginally involved in such later skirmishing as occurred. (*See infra*, paras. 188, 196.) Instead, Uganda's efforts were directed toward securing a lasting peace that would bring security to the region. The first major step toward such a peace was taken in July 1999 at Lusaka, Zambia where all parties to the conflict in the DRC concluded the Lusaka Agreement.

177. The nature of the UPDF's deployment, and indeed its legal status, changed upon the coming into force of the Lusaka Agreement at the end of July 1999. As demonstrated in the *Counter-Memorial*, and as further shown below (*see infra*, paras. 213-26), the Lusaka Agreement transformed the Ugandan presence in eastern Congo from one based exclusively on self-

⁵⁵ In her *Reply*, the DRC presents a battle history showing the timing and nature of alleged confrontations between the UPDF and FAC-allied forces. The parties are in basic agreement about the dates and places of these events. Nevertheless, the DRC charges that Uganda only mentions certain battles in the *Counter-Memorial* and ignores others. (DRCR, para. 2.68.) Uganda readily acknowledges that, in the *Counter-Memorial*, she deliberately decided not to burden the Court with a detailed, battle-by-battle account of the conflict, but instead chose to focus on the major clashes. Because the parties agree that the UPDF was inside the DRC and there were confrontations with DRC-allied forces, little is gained by a battle-by-battle exegesis.

defence, to one based as well on the formal agreement of all parties to the conflict, including the Government of the DRC.

178. Indeed, it is disingenuous for the DRC to continue to challenge Uganda's motives for deploying its armed forces in eastern Congo. The DRC has long recognised that the ADF and other anti-Uganda insurgent groups posed a serious threat to Uganda's security, and that this threat justified the presence of Ugandan armed forces in the DRC. By freely allowing Uganda to send her troops into Congo prior to and in accordance with the April 1998 Protocol between the two States, (*supra*, paras. 89-98), and by acknowledging the legitimacy and seriousness of Uganda's security concerns in the Lusaka Agreement (UCM Annex 45), the DRC has repeatedly conceded that Uganda had valid security interests in preventing eastern Congo from being used as a base for attacks against her.

179. Moreover, as mentioned above, the 6 September 2002 Luanda Agreement between Uganda and the DRC constitutes further recognition by the DRC of the genuineness and importance of Uganda's security interests, as well as the continuing necessity for Uganda to maintain a limited military presence in eastern Congo. (*Infra*, paras. 229, 233.) The *Reply's* efforts to paint a contrary portrait, that Uganda's motivations were something other than the security of her borders, are thus refuted by the DRC's own actions.

F. The DRC's Failure To Demonstrate The Impropriety Of Uganda's Limited Relationships With Congolese Rebel Organisations

180. The DRC devotes a significant portion of her *Reply* to developing the alleged circumstances of Uganda's support for Congolese rebel organisations, namely the MLC and the RCD, after the rebellion against President Kabila's government erupted in August 1998. (*See* DRCCR, paras. 2.95-2.147.) Before addressing the substance of the DRC's argument, Uganda first notes that, contrary to the DRC's contention, she has never denied providing assistance to these groups. (DRCCR, para. 2.95.) In the *Counter-Memorial*, Uganda noted merely

MAP OF THE DRC AND NEIGHBORING STATES SHOWING STRATEGIC AIRFIELDS IN THE DRC FROM WHICH UGANDA WAS VULNERABLE TO ATTACK IN AUGUST - SEPTEMBER 1998



Transverse Mercator Projection
 Datum: WGS-84
 Scale: 1:16,100,000
 (accurate at Equator)

0 250 500
 Statute Miles

0 300 600
 Kilometers

International boundaries depicted herein are solely for illustrative purposes.
 Map prepared by: International Mapping Associates.

that at the oral proceedings on the DRC's application for interim measures, she did not address the issue of support for the rebels one way or the other. (UCM, para. 143.) Moreover, because the DRC's *Memorial* was all but incoherent on this question, the *Counter-Memorial* proceeded from the premise that the DRC had not presented even a *prima facie* case meriting further response.

181. Because the DRC has now come forward with at least a coherent argument on the issue (albeit one that strains the limits of the Court's rules concerning reply briefs), Uganda will now fully respond to the DRC's allegations.

182. Uganda has provided assistance to the MLC and the RCD. While the assistance has been largely political in nature, it has also included the provision of military training and supplies. There have also been occasions when the troops of these Congolese rebel organisations fought alongside and in coordination with Uganda's armed forces in military actions against forces allied with the DRC Government, including those of Sudan, Chad, the ADF/WNBF and ex-FAR/Interahamwe. However, Uganda's military support to, or coordination with, the MLC and RCD, was strictly limited as to time and purpose, and sanctioned by the Lusaka Agreement of July 1999, as discussed below.

(1) *Limitations as to time*

183. Uganda provided no military assistance of any kind to Congolese rebel organisations before the entry of her own armed forces into the DRC in the middle of September 1998. All military support provided by Uganda to the MLC and the RCD came *after* that critical time; that is, *after* Uganda's security was so grievously and imminently threatened by the DRC's military alliance with Sudan and the Congo-based anti-Uganda insurgents that her intervention in eastern Congo was necessitated by self-defence.

184. Moreover, the nature and extent of Uganda's military support to the Congolese rebels was consistent with and limited to the requirements of her self-defence. Uganda deliberately

refrained from providing the rebels with the kinds or amounts of support they would require to achieve ends, such as the conquest of territory or the overthrow of the DRC Government, that were beyond what was required for Uganda's self-defence.

185. The *Reply* itself acknowledges that such limited assistance to anti-government forces is consistent with principles of self-defence in international law. At paragraph 6.49, the DRC asserts that any aid she might have lent to anti-Uganda forces in August 1998 or thereafter can be excused as self-defence because the DRC had been subjected to an armed attack from Uganda. Of course, Uganda has already shown that she undertook no hostile actions against the DRC in August 1998, and that Uganda herself, not the DRC, was the victim of the first armed attacks. Nevertheless, the *Reply* states:

*Il va de soi que ce soutien [aux rebelles anti-ougandais]... ne peut être considéré, en tant que tel, comme contraire à l'obligation de ne pas recourir à la force dans les relations internationales. Cet appui limité constituerait en effet l'exemple type d'une action proportionnée, menée en légitime défense par un Etat agressé.*⁵⁶

(DRCR, para. 6.49.)

186. By parity of reasoning, Uganda's limited support for Congolese rebel organisations should qualify as just the sort of "proportionate action, carried out in legitimate self-defence" that the DRC justifies.

187. The *Reply* all but concedes that Uganda's military support for the Congolese rebel organisations did not commence before late September 1998. Indeed, the DRC acknowledges that the MLC did not even come into existence

⁵⁶ "It is obvious that this support [to the anti-Ugandan rebels]...cannot be considered, as such, as a contravention of the obligation not to resort to force in international relations. This limited support would in fact be a typical example of a proportionate action, carried out in legitimate self-defence by a State which is a victim of aggression."

until “*la fin du mois de Septembre 1998.*”⁵⁷ (DRCR, para. 2.111.) This fact is confirmed by MLC founder and leader Jean-Pierre Bemba in his book, *Le Choix de la Liberté*, cited extensively in the *Reply*. Even then, it took Bemba several months to attract recruits. Indeed, it was not until January 1999 that he had sufficient troops to undergo military training, which Uganda assisted in providing: “*Après cinq mois de formation intensive, des centres d’instruction de Buta, Bumba et Lisala sortent des bataillons d’infanterie prêts au combat. ... De janvier à mai 1999, tous les efforts sont orientés sur ces centres de formation.*”⁵⁸ (UR Annex 46, p. 37.) Thus, according to the *Reply* itself, the MLC was not “ready-for-combat” until May 1999, and its participation in military engagements before that date were, of necessity, marginal.

188. In July 1999, two months after the MLC became combat-ready, a political settlement was achieved. The Lusaka Agreement produced not only a cease-fire, but also established the basis for a comprehensive peace settlement agreed to by all the parties to the conflict, including the DRC, Uganda, the MLC and the RCD. According to the *Reply* (again quoting Mr. Bemba), when this agreement was reached, President Museveni “*me confirme que les troupes ougandaises vont se retirer du Congo.*”⁵⁹ (DRCR, para. 2.114.)

189. Uganda’s military support for the RCD did not begin until March 1999, even later than she commenced supporting the MLC. Uganda has already demonstrated that she had no role whatsoever in the creation of the RCD in August 1998. (*Supra*, paras. 156-60.) From its inception, the RCD received military support from Rwanda, and its forces were joined in battle by seasoned elements of the Rwandan Army, as the Government of Rwanda has publicly acknowledged. Thus, the

⁵⁷ “the end of September 1998.”

⁵⁸ “After five months of intensive training, the training centers of Buta, Bumba and Lisala passed out ready-for-combat infantry battalions.... From January to May 1999 all the efforts were directed toward the training centers.”

⁵⁹ “confirmed to me that the Ugandan forces were going to be withdrawn from Congo.”

combined RCD/Rwandan forces took Kisangani on 31 August 1998, Kindu in October 1998, and ultimately controlled extensive swathes of territory in eastern, southern and central Congo.

190. As so often in the *Reply*, the DRC attempts to impute responsibility to Uganda for Rwanda's actions. Relying, as always, on the accounts of journalists who themselves assume, without justification, that Rwanda and Uganda are interchangeable, the *Reply* accuses both States of providing military support to the RCD. (*See, e.g.*, DRCR, paras. 2.129-2.131.) No real evidence against Uganda is presented, however, because Uganda provided no military support to the RCD during this period.

191. From August 1998 to March 1999, Uganda provided only political support to the RCD, consisting mainly of advice on how best to seek a political settlement with the DRC Government. (*Supra*, paras. 156-60.) In March 1999, as the *Reply* acknowledges, the RCD split into two, with one faction -- the one that favoured a political settlement with the DRC Government -- abandoning the RCD's headquarters in Goma (located on the DRC's border with Rwanda) to set up its own base in Kisangani (closer to Uganda). (*See* UR Annex 46, p. 107.) Uganda chose to support the faction known at the time as the RCD-K (for Kisangani), and later as RCD-ML, precisely because it was more open to a political solution in the DRC, while the Rwandan-supported RCD-Goma favoured the military overthrow of the DRC Government. (*Ibid.*) It was only after the March 1999 breakup of the RCD that Uganda began to provide military support, and then only to the Kisangani-based faction that sought a political settlement.

192. Thus, Uganda's limited military support for the Congolese rebel organisations was consistent temporally with her singular objective of protecting herself against the threat posed to her security by the DRC's military alliance with her most dangerous enemies, especially Sudan, and by the aggressive actions taken by those hostile forces in Congolese territory within striking distance of Uganda. To quote again from the *Reply*:

*Cet appui limité constituerait en effet l'exemple type d'une action proportionnée, menée en légitime défense par un Etat aggréssé.*⁶⁰

(DRCR, para. 6.49.)

(2) *Limitations as to purpose*

193. Uganda's only purpose in sending her troops into eastern Congo, and in providing limited military support to Congolese rebel organisations, was self-defence. When and to the extent that these organisations sought to pursue other purposes, including military advances beyond areas Uganda deemed necessary for her own protection, Uganda cut them off. Mr. Bemba himself clearly understood the limits of Uganda's support for his organisation: "*Le gouvernement ougandais veut empêcher tout nouvel assaut des rebelles ougandais, ADF, NALU, WNBf et autres réfugiés dans les montagnes congolaises. Une kyrielle de mouvements armés menacent en permanence les frontières ougandaises.*"⁶¹ (UR Annex 46, p. 108.)

194. Indeed, Mr. Bemba complained that Uganda sought to restrain him whenever he sought militarily to push back the front lines beyond the perimeter Uganda considered necessary to her self-defence. In particular, after some MLC advances in Equateur Province, Mr. Bemba was anxious to take advantage of his momentum and pursue further military gains down the Congo River (from which Kinshasa, the DRC's capital, would be a ready target). But President Museveni expressly opposed the idea. (UR Annex 46, p. 31.) Mr. Bemba briefly continued his advance, but without Ugandan support.

⁶⁰ "This limited support would in fact be a typical example of a proportionate action, carried out in legitimate self-defence by a State which is a victim of aggression."

⁶¹ "The Ugandan Government wanted to stop any new assault from Ugandan rebels ADF, NALU, WNBf, and other refugees in the Congolese mountains. A group of armed political groups was a threat to Uganda from across the Congo."

195. Later, when the MLC took Buburu (near Mbandaka) in or around May 1999, Uganda succeeded in restraining the MLC from proceeding further in the direction of Kinshasa. Mr. Bemba states: “*La mise en péril des relations amicales avec notre allié ougandais ... m’oblige[] à revoir notre position.*”⁶² (UR Annex 46, p. 81.)

196. As discussed above, Mr. Bemba further reports that Uganda’s support for the RCD, like her support for the MLC, was limited to and consistent with her self-defence requirements. He confirms that Uganda supported Professor Wamba dia Wamba’s RCD/K (later RCD/ML) faction precisely because he was more open to a political compromise with the DRC Government than was the Rwanda-backed RCD/Goma. (*Ibid.*, p. 107.)

197. According to Mr. Bemba, Uganda’s sole interest in the DRC was fully revealed to him by President Museveni himself, shortly after the UPDF took Gbadolite, in July 1999, and thereby ended the Sudanese military presence in Congo. According to Mr. Bemba, President Museveni then declared that Uganda would be progressively withdrawing its troops from the DRC, since: “[L]es Soudanais ne peuvent plus disposer de bases arrières au Congo. Nous avons fait notre travail. Si les Congolais veulent poursuivre la guerre, c’est leur affaire.”⁶³ (UR Annex 46, p. 134.) From that point forward, Mr. Bemba attests, Ugandan troops were no longer on the front lines. (*Ibid.*) Thus, once Uganda had driven her enemies out of the DRC and secured the Lusaka Agreement recognising her security interests and establishing a system of public order to, *inter alia*, protect her borders, her further deployment in the DRC ended, and her withdrawal began.

198. Apart from military cooperation, Uganda occasionally lent support to the Congolese rebel organisations in the exercise of their administrative functions in the territories that they

⁶² “The jeopardizing of our friendly relations with our Ugandan allies ... forced me to re-examine our position.”

⁶³ “Sudan can no longer have rear-bases in the DRC. We accomplished our task. If the Congolese want to continue the war, it’s their business.”

respectively controlled. At all times governmental administration in the rebel-held territories was performed by the rebels themselves, through the local and regional administrative structures that they established. Since there was no DRC Government presence of any kind in the rebel-controlled areas after August 1998, when the war broke out, the MLC and the RCD effectively constituted *de facto* governments in their respective zones of operation. From time to time, and upon the request of these *de facto* governments, Uganda provided limited assistance to them.

199. Thus, there is no merit to the DRC's allegation that Uganda's presence in eastern Congo constituted an "occupation." Uganda had no interest in maintaining an "occupation" of the DRC. Nor did she have the means. As explained above, the Ugandan military presence in the DRC never reached as high as 10,000 troops, and they were ultimately dispersed across an area roughly the size of Germany, without roads, infrastructure, or modern communications.

200. Unsurprisingly, even as the DRC insists that Uganda "occupied" her territory, she also acknowledges that she lacks the facts to support this claim. So, for example, the *Reply* alleges on the one hand that "[u]ne fois la conquête réalisée, l'UPDF a établi une zone d'occupation dont elle a assuré l'administration de façon directe et indirecte."⁶⁴ (DRCR, para. 2.77.) Yet, on the other hand she admits "[l]a RCD n'ayant, par définition, pas accès aux zones occupées, elle ne peut exposer dans leurs détails les modalités de l'administration directe et indirecte de la partie du territoire...."⁶⁵ (DRCR, para. 2.81.) Given this frank admission, one wonders how the Court can be expected to adopt as "fact" matters on which the DRC herself admits ignorance.

⁶⁴ "[w]hen the conquest was completed, the UPDF formed a zone of occupation which it governed both directly and indirectly."

⁶⁵ "[s]ince the DRC does not have access to the occupied areas, it cannot present the details of the direct and indirect rule in that part of Congo's territory"

201. Elsewhere, the DRC's own assertions undermine her claim of "occupation." According to the DRC, for example, "[d]ans bien des situations, lorsque les troupes ougandaises se retirent d'une localité ou d'un territoire occupé c'est pour en laissé [sic] le contrôle au MLC. Ce fut entre autres le cas pour les villes de Buta et Gemena."⁶⁶ (DRCR, para. 2.127.) Thus, according to the DRC herself, there was no real occupation. Quite the contrary, administration of the territory in which Ugandan forces operated was very much in the hands of the Congolese rebels themselves. Although the *Reply* cites Mr. Bemba authoritatively on numerous occasions, it ignores him completely on the subject of who administered this territory. This is because, as Mr. Bemba repeatedly emphasises, local administration in eastern Congo was provided by the MLC and the RCD, not by Uganda. (*See, e.g.*, UR Annex 46, pp. 65, 66, 129, 156.) In this regard, it should be recalled that Mr. Bemba ultimately had 33 battalions under his command (consisting of more than 25,000 troops), a force twice as large as Uganda's.

202. Uganda's participation in local administration was strictly limited. She did try to unify the Congolese rebel organisations, and to stop them from fighting among themselves and with one another. The fighting within and among the groups served no one's purposes, least of all the Congolese people's, and if Uganda could bring her influence to bear in resolving these internal conflicts, so much the better. Otherwise, it was Uganda's clear policy to leave Congolese matters to the Congolese. (UR Annex 46, p. 156; *see also* UCM Annex 21, pp. 13-15.)

203. To be sure, there was one significant exception to this policy, and it is given great attention in the *Reply*, perhaps because it is the only example the DRC can find of Uganda's direct involvement in local administration. It is true that UPDF General James Kazini played a significant role in the appointment of Adele Lotsove Mugisa as Governor of Ituri Province. (DRCR, para. 4.54.) Uganda acknowledges this incident, but denies that it is typical. In fact, it is unique. In the

⁶⁶ "In many cases, the Ugandan troops left an area or occupied territory in the hands of the MLC. This was the case with Buta and Gemena towns."

first place, General Kazini intervened in an emergency situation, where inter-ethnic violence was growing out of control, in order to ease the humanitarian crisis. (UR Annex 35.) Second, General Kazini was reprimanded by President Museveni himself for his intervention in Congolese affairs.⁶⁷ (UR Annex 65, Part C, pp. 23-25.)

(3) *The status of the Congolese rebel organisations under the Lusaka Agreement*

204. The DRC admits that after August 1998, she maintained no administrative presence and exercised no authority whatsoever in the eastern and northeastern regions of the country in which Ugandan troops later operated. (See DRCR, para. 2.81.) Although the central Congolese Government's presence and authority in those regions were always scant, they evaporated completely with the outbreak of the rebellion against President Kabila in August 1998. By the end of that month, the rebels occupied and controlled almost half of the DRC. In the more than four years since the rebellion began, the central government has never reclaimed its authority, or reestablished a presence in the rebel-controlled areas. (See *infra*, Ch. IV, para. 442.) Thus, the MLC and the RCD, which have continuously occupied and administered these areas, are no mere rebel organisations; for over four years they have been, and remain, the *de facto* governments of the regions they control.

205. In recognition of this, the Lusaka Agreement of July 1999 conferred on the MLC and RCD co-equal status with the DRC Government in Kinshasa. A straightforward analysis of the Agreement fully demonstrates this. The Preamble to the Lusaka Agreement begins by:

TAKING note of the commitment of the Congolese Government, the RCD, the MLC and all other Congolese political and civil

⁶⁷ The circumstances of Gen. Kazini's involvement in the appointment of Ms. Lotsove Mugisa are more fully discussed below in Ch. IV, paras. 488-91.

organisations to hold an all inclusive National Dialogue aimed at realising national reconciliation and a new political dispensation in the DRC[.]

(UCM Annex 45, Preamble.)

206. The Agreement then goes on to state:

...The Ceasefire shall entail the cessation of:
...attempts to occupy new ground positions
and the movement of military forces and
resources from one area to another, without
the prior agreement between the parties[.]

(*Ibid.*, Art. I, para. 3(b).) In other words, all forces -- those of the DRC Government, the MLC and the RCD alike -- were to *remain in place* pending the completion of an “open national dialogue,” a process intended to secure “a *new political dispensation* and national reconciliation in the DRC.” (*Ibid.*, Art. III, para. 19; emphasis added.)

207. Moreover, the Agreement makes clear that the MLC and RCD were to retain administrative authority over the areas then under their military control, at least until the conclusion of the inter-Congolese dialogue. Article III, paragraph 18 provides:

In accordance with the terms of this Agreement and *upon conclusion of the Inter-Congolese political negotiations*, state administration shall be re-established throughout the national territory of the Democratic Republic of Congo.

(*Ibid.*, Art. III, para. 18; emphasis added.) Thus, pending the “re-establishment” of “state administration” *after* the inter-Congolese dialogue, administrative authority was necessarily vested in the powers in place.

208. Finally, the fact that the MLC and RCD were intended to enjoy equal status with the DRC Government was confirmed in Annex A to the Agreement. Chapter 5, paragraph 5.2, states

unequivocally: “[A]ll the participants in the inter-Congolese political negotiations shall enjoy equal status[.]” (*Ibid.*, Annex A, Ch. 5.2; emphasis added.)

209. The equal status of the Congolese Government, the MLC and the RCD was also recognised in paragraph 6.2 of Annex A. In that paragraph the parties agreed that operations “throughout the national territory which are of general interest” could only be carried out through “a consultative mechanism among the Congolese parties:”

On the coming into force of this Agreement, there shall be a consultative mechanism among the Congolese Parties which shall make it possible to carry out operations or actions throughout the national territory which are of general interest, more particularly in the fields of public health . . . , education . . . , migrations, movement of persons and goods.

(*Ibid.*, Annex. A, Ch. 6.2.)

210. The Lusaka Agreement thus formally gave the MLC and RCD the equal status with the DRC Government they had previously enjoyed *de facto*. In so doing, the Agreement gave Uganda and other parties to the Agreement as much right to assist the MLC and RCD in their respective areas of control as to support the Government of President Kabila in Kinshasa. Thus, the Lusaka Agreement fully legitimated Uganda’s support of the MLC and the RCD.

G. The Effects Of The Lusaka Agreement On The DRC’s Claims Against Uganda

211. In her *Counter-Memorial*, Uganda presented the Court with a detailed historical and textual analysis of the Lusaka Agreement, together with the subsequent disengagement plans, and showed how it legitimated the UPDF’s presence in Congo. (See UCM, paras. 65-101.) In response, the DRC is all but silent. The *Reply* does devote some eight paragraphs to the topic (DRCR, paras. 3.211-3.218), but these few paragraphs do

no more than rehash the sparse treatment the DRC gave to this topic in her *Memorial*. (See DRCR, para. 3.213.) The DRC's effort to bury the Lusaka Agreement is a potent indication of just how strongly it favours Uganda's position in this case.

212. Ironically, the DRC suggests that it was Uganda that somehow failed to respond to arguments presented in her *Memorial*. (DRCR, para. 3.214.) But this statement seems based on nothing more than a willful misreading of the *Counter-Memorial*. In fact, Uganda dealt fully with each of the three issues raised by the DRC.

(1) *Uganda's responses to the DRC's arguments*

213. The DRC's first argument is that the Lusaka Agreement cannot *retroactively* justify Uganda's military intervention in eastern Congo *before* July 1999. Uganda submits that this argument misses the point.

214. In the Agreement, the parties expressly recognised that certain "armed groups" based in Congo, including especially the ADF and five other anti-Uganda groups, constituted real threats to the security of the DRC's neighbours, including Uganda. (UCM Annex 45, para. 9.1 & Annex C.) The parties considered these threats so serious that they agreed to prohibit aid or assistance of any kind to any of the designated armed groups, and to prevent them from staging further cross-border attacks against neighbouring States. (*Ibid.*, para. 22.) Above all, the parties agreed to disarm all of the armed groups, to demobilise them, and to repatriate them to their countries of origin. (*Ibid.*) Thus, by targeting the anti-Uganda insurgent groups by name, by agreeing not to support them and instead to disarm and demobilise them, and by undertaking a commitment to prevent future cross-border attacks from Congolese territory, the DRC Government and the other parties to the Lusaka Agreement acknowledged the validity of Uganda's longstanding claim that the presence of these groups in the border regions of eastern Congo constituted a serious threat to her security.

215. At the same time, the parties' agreement that foreign troops, including Uganda's, should be withdrawn from the DRC only *after* the disarmament/demobilisation/repatriation of the named armed groups can only be interpreted as their recognition that the presence of Ugandan troops in the DRC was linked to and, indeed, an appropriate response to, the presence there of the ADF and other anti-Uganda groups. This is not a question of *retroactive* application of the Agreement. It is a recognition by all the parties thereto, including the DRC, that Uganda's security concerns were serious, and her response appropriate. *A fortiori*, if Uganda's security concerns were sufficiently serious in July 1999 to justify the continued presence of her armed forces in the DRC, they were even more serious -- and the presence of Ugandan forces in the DRC was even more justified -- in September 1998, when the ADF was at its maximum strength and thousands of hostile Sudanese troops had taken up strategic positions against Uganda in eastern and northeastern Congo.

216. The DRC's second argument is that the Lusaka Agreement required all foreign forces to exit the DRC within six-months no matter what transpired with respect to the armed groups or other aspects of the Agreement. This is a blatant misreading of the Agreement. The *Counter-Memorial* showed that the Agreement was intended as an indivisible, integrated whole. (UCM, paras. 66-75, 79.) The timing of each of the action items, including the disarmament/demobilisation/repatriation of the "armed groups" and departure of foreign troops, was mutually dependent.

217. It simply is not correct to say that the fundamental purpose of the Agreement was to achieve the withdrawal of foreign forces. (DRCR, para. 3.213.) The fundamental purpose of the Agreement was to achieve a comprehensive public order system leading to a definitive peace settlement. The parties recognised that this could not be accomplished without, *inter alia*, disarmament/demobilisation/repatriation of the "armed groups" that threatened the security of Uganda and the DRC's other neighbours. Thus, the timetable for performance of all of the action items under the Agreement, set forth in Annex B thereto, purposely schedules the disarmament/demobilisation/

repatriation of the armed groups *before* withdrawal of foreign troops was to begin. (UCM Annex 45, Annex B, paras. 16-27.)

218. Moreover, the fact that the Kampala disengagement plan was entered (and agreed to by the DRC) on 8 April 2000 (*i.e.*, well beyond the purported six-month deadline now claimed by the DRC) shows by itself that the parties have always been in agreement that the commitments set forth in the Lusaka Agreement are mutually dependent, and that there is no independent deadline for the withdrawal of foreign troops. (UCM, para. 79; UCM Annex 59.)

219. Indeed, the DRC's principal ally, the Government of Zimbabwe, has repeatedly confirmed this. In April 2001, Zimbabwe's Minister of Defence, Hon. Moven Mahachi, stated that:

[T]he successful implementation of the Lusaka Peace Accord would determine the pace at which Zimbabwe would continue to reduce its troops in the DRC until an appropriate time for total withdrawal as outlined in the Kampala disengagement and Harare sub-plans.

(UR Annex 50.)

220. In July 2002, Zimbabwe's Foreign Minister, Hon. Stanley Mudenge, said: "As soon as the Lusaka Agreement is fulfilled we will certainly withdraw our troops immediately." (UR Annex 82.) Thus, there can be no doubt that withdrawal of foreign troops from Congo was linked to and dependent upon the fulfillment of other obligations under the Lusaka Agreement, including the disarmament/demobilisation/repatriation of the designated armed groups.

221. Lest any doubt remain, it should be noted that when President Museveni announced, in April 2001, that all remaining Ugandan troops would be immediately withdrawn from the DRC, ahead of the fulfillment of the other commitments of the Lusaka Agreement, he was beseeched by the international community, including the Secretary-General of

the United Nations *not* to do so. The Secretary-General specifically asked, and ultimately persuaded, President Museveni to allow Uganda's troops to remain in place, and to be withdrawn only in accordance with the Lusaka Agreement's provisions. In his letter to the President of 4 May 2001, the Secretary-General wrote:

Excellency:

Your special envoy, the Honorable Amama Mbabazi has explained to me the circumstances under which Uganda announced its withdrawal from the Lusaka Peace Process.

At this particularly sensitive and delicate stage in the DRC Peace Process, I believe it is crucial that Uganda and all the other signatories to the Lusaka Agreement stay fully engaged with the international community and United Nations in particular, as together we seek to consolidate the recent positive trends in the DRC.

I am confident of your commitment to the search for peace in the DRC. In this regard, I wish to encourage you to continue with the withdrawal of Ugandan troops *in the context of the disengagement process*.

I am sure you will agree with me that the present momentum towards peace in the DRC must be sustained and exploited to the full; in this regard I know I can count on your continued assistance and good will.

(UR Annex 56; emphasis added.)

222. The significance of the Secretary-General's letter will not be lost on the Court. Faced with the prospect of the unilateral withdrawal of Ugandan forces from the DRC, the Secretary-General reacted not with joy, as the *Reply* might lead

one to believe, but with sufficient concern to request, in writing, that Uganda take no such action. In so doing, he expressly endorsed the argument Uganda has been making from day one -- that the Lusaka Agreement permitted her to remain deployed in the DRC until the necessary preconditions for the withdrawal of all foreign forces, including the disarmament/demobilisation/repatriation of "armed groups" that threatened the DRC's neighbours, were fulfilled.

223. Testifying to the Porter Commission, Hon. Ralph Ochan described the circumstances giving rise to the Secretary-General's letter. Referring to false allegations about Uganda's reasons for keeping troops in Congo initiated by the DRC, he stated:

Ochan:

...But of course you realize in the end our own Head of State could no longer take these insults anymore and made the drastic decision.

Lead Counsel:

Which drastic decision are you referring to?

Ochan:

To pull out of Congo, completely and the same Security Council would dance around and write to you and say please don't do it because it is going to cause more problems than to solve problems, stick to Lusaka.

Lead Counsel:

But it was Uganda's obligation under the Lusaka Agreement actually to withdraw.

Ochan:

According to the timetable drawn out here.

Lead Counsel:

So it was not really a drastic decision.

Ochan:

It was, to withdraw outside the context of the Agreement, that was the decision.

Lead Counsel:

There is a letter which has been mentioned by another witness, who wrote this letter?

Ochan:

It is the Secretary General who wrote it.

....

Lead Counsel:

... And you were saying that this letter was asking what?

Ochan:

To stay engaged within the Lusaka Peace Agreement.

Justice Porter:

Engaged with who?

Ochan:

Within the peace process, within the context of the Lusaka peace Agreement.

Justice Porter:

Mr. Ochan what I read here is to engage with the International Community and the

United Nations in particular, and the paragraph says

....

“Fully engaged with the International Community and the United Nations in particular.”

Ochan:

Indeed because the United Nations adopted the Lusaka peace Agreement.

“As together we seek to consolidate the recent positive trends in the DRC. I am confident of your commitment to search for peace in the DRC. In this regard I wish to encourage you to continue with the withdrawal of Ugandan troops in the context of the disengagement process.”

....

But what our President had announced was ...the unilateral withdrawal outside the disengagement process, outside Kampala and Harare disengagement plan....

Justice Porter:

And the agreement requires you to stay.

Ochan:

To withdraw as per the disengagement plan and surpass all the parties.

Justice Porter:

They don't call a spade a spade.

Ochan:

They usually don't.

Justice Berko:

So I take it that it is on the basis of this letter that Uganda is still in DRC.

Ochan:

Well as you know the Army Council, the High Command, the Cabinet and Parliament all resolved that we should stay within the process under the Agreement. In other words the Secretary General managed to persuade them to side with him.

Justice Porter:

Withdrawal had taken place, hadn't it?

Ochan:

Yes, but within the Lusaka.

(UR Annex 64, Part B, pp. 15-18.)⁶⁸

224. The DRC's third argument is that Security Council Resolution 1304 of 16 June 2000 required the immediate withdrawal from Congo of all Ugandan forces, without mention of disarming, demobilising or repatriating the Congo-based anti-Uganda insurgent-groups, and thereby constitutes a rejection of Uganda's position. However, the *Counter-*

⁶⁸ The DRC herself recognises the circumstances giving rise to the Secretary General's letter. At paragraph 2.90 of the Reply, the DRC admits that the day before the Secretary General's 4 May 2001 letter, representatives from Uganda's Permanent Mission to the United Nations informed him that "*cet Etat [l'Ouganda] était prêt à retirer toutes ses troupes.*" (DRCR, para. 2.90, citing Secretary-General's MONUC Report.) ("[Uganda's] forces were about to be withdrawn from the DRC.") The response was the Secretary-General's letter asking Uganda not to do so.

Memorial demonstrated that Resolution 1304 contemplates withdrawal of Ugandan and other foreign forces “in conformity with the timetable of the [Lusaka] Ceasefire Agreement and April 2000 disengagement plan,” and that the Security Council viewed the parties’ obligations under the Lusaka Agreement as “reciprocal.” (See UCM, paras. 80-82.) Thus, far from rejecting Uganda’s argument, the Security Council actually endorsed it.

225. Finally, to these three meritless arguments, the DRC attempts now to add a fourth -- that the Court’s November 2001 procedural ruling on Uganda’s counter-claims somehow precludes Uganda from invoking the Lusaka Agreement as part of its substantive defence against the DRC’s claims. (DRCR, para. 3.216.) But the Court’s ruling on Uganda’s third *counter-claim* cannot in any way foreclose Uganda from addressing the impact of the Lusaka Agreement on Uganda’s *defences* to the DRC’s claims in chief.

226. As discussed below in paragraphs 318 to 319 of Chapter III, nothing in the Court’s Order of 29 November 2001 suggests that the Lusaka Agreement is irrelevant to the DRC’s claim or Uganda’s defences. Rather, it holds merely that Uganda may not maintain her *counter-claim* against the DRC based on the DRC’s alleged violation of the Agreement because the particular delicts identified in that counter-claim do not arise from the same circumstances as the DRC’s claims against Uganda. Obviously, this is not the same as holding that the Agreement is irrelevant to all facets of this case, as the DRC now argues.

(2) *Recent developments in fulfillment of the Lusaka peace process*

227. The *Counter-Memorial* details Uganda’s actions in fulfillment of its obligations under the Lusaka Agreement and in support of the peace process. (UCM, paras. 78-86.)

228. Since the *Counter-Memorial* was submitted in April 2001, Uganda has remained fully engaged in the Lusaka peace process. Thus, for example, on 19 November 2001, MONUC

requested from Uganda information concerning the status of her withdrawal of troops from the DRC. (UR Annex 69.) In her response, Uganda submitted the information MONUC requested, including data showing that Uganda had, as of that date, withdrawn from Congo 6,655 soldiers. (*Ibid.*)

229. Since December 2001, Uganda has withdrawn from Congo virtually all of her remaining troops. (*See* UR Annex 89.) As of the submission of this *Rejoinder*, only one battalion of Uganda troops (approximately 775 men) was stationed inside the DRC, in Bunia. These troops are there with the renewed consent of the DRC Government, as set forth in the Luanda Agreement of 6 September 2002 (UR Annex 84, Art. 1, paras. 3-4 & Annex A), and at the express request of MONUC, which asked the UPDF to remain there, pending replacement by Congolese or United Nations peacekeeping forces capable of maintaining security in the region. (UR Annex 76.)

230. Uganda notes with satisfaction that the DRC, as well, has begun to honour her obligations under the Lusaka Agreement. The long-delayed inter-Congolese dialogue, required by Chapter 5 of the Agreement, was finally given a kick-start at Sun City, South Africa in April 2002. It produced significant progress toward a “new political dispensation” in the DRC, as required by paragraph 5.1 of the Agreement. In particular, an agreement in principle to share power in a unitary Congolese national government was reached by DRC President Joseph Kabila (son of the late Laurent Kabila) and MLC leader Jean-Pierre Bemba, with the former continuing as President and the latter serving as Prime Minister, pending the holding of national elections within two years. (UR Annex 80.)

231. This positive development was, *inter alia*, a recognition by the DRC Government of the legitimacy of the MLC as a significant and representative Congolese political force, as well as the *de facto* authority in much of eastern and northern Congo. Unfortunately, however, the RCD did not accept the role assigned its leadership in the proposed new political dispensation, and the agreement could not be fully consummated at Sun City. (*Ibid.*)

232. However, after a brief hiatus, the DRC Government resumed negotiations with the MLC and RCD over a new, more inclusive power-sharing arrangement. Under discussion was a new political dispensation in which, pending national elections, President Joseph Kabila would continue in office, and the leaders of the MLC and RCD would serve as Vice-Presidents. (UR Annex 99.) These discussions were continuing as of the date of submission of this *Rejoinder*. It is Uganda's hope that an agreement satisfactory to all the Congolese parties will be achieved as soon as possible, and what the Lusaka Agreement recognised as the "internal" dimension of the Congolese conflict will be fully and finally resolved.

233. The "external" dimension of the Congolese conflict also appears close to a felicitous conclusion. In the Luanda Agreement between the DRC and Uganda of 6 September 2002, the DRC expressly recognised, once again, the serious threats to Uganda's security posed by armed groups of anti-Uganda insurgents operating from eastern Congo, and agreed that Ugandan troops could remain in the DRC until another mechanism for "guaranteeing Uganda's security" is put in place. In Article I, the Agreement thus provides:

The Parties agree that the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda's security, including training and coordinated patrol of the common border.

(UR Annex 84, Art. 1, para. 4.) Accordingly, as recently as September 2002, four years after the Congolese rebellion of August 1998 set off the present armed conflict, the DRC expressly acknowledged that Uganda's security concerns still were sufficiently weighty as to necessitate the maintenance of UPDF troops on Congolese soil.⁶⁹ The DRC and Uganda also agreed:

⁶⁹ Here again, the authors of the DRC's *Reply* are out of step with the realities on the ground. In another rhetorical flight of fancy, the *Reply* asserts: "*l'Ouganda se réserve le droit, comme il le fait depuis près de*

To refrain from all types of military and logistical support including the provision of bases and sanctuary to the armed groups, including inter-ethnic militia, subversive organisations and all rebel movements against the interests of the Parties.

(*Ibid.*, Art. 2, para. 2.)

234. Beyond recognising the continuing validity of Uganda's security concerns, the Luanda Agreement also signals the beginning of a new era in relations between the DRC and Uganda. Uganda looks forward to realising the Agreement's promise of a cooperative, mutually beneficial relationship with the DRC, and anticipates that the two States will make every effort to put years of mistrust and hostility behind them once and for all, and to build an enduring friendship.⁷⁰

235. Thus, Uganda is hopeful that the successful conclusion of the Lusaka peace process, begun in July 1999, is now in sight.

quatre années, de décider unilatéralement de maintenir son armée en territoire étranger au nom de 'considérations de sécurité' qu'il est le seul à pouvoir apprécier." (DRCR, para. 2.93.) ("Uganda reserved itself the right, like it has done for the last four years, to decide unilaterally to keep its army on foreign territory in the name of 'security concerns.' Uganda is the only one that appreciates those concerns.") Whoever wrote the *Reply* needs to read the Lusaka and Luanda Agreements, in which the DRC (and others, in the case of the Lusaka Agreement) not only recognised the validity of Uganda's security concerns, but also expressly agreed to the presence of Ugandan troops in the DRC until the armed groups that threaten Uganda's security are removed.

⁷⁰ In another milestone development in fulfillment of the Lusaka peace process, the DRC reached a bilateral agreement with the Government of Rwanda. In July 2002, at Pretoria, South Africa, the DRC and Rwanda agreed on a specific timetable for the withdrawal of Rwandan troops from Congo in return for the DRC's cooperation in the *disarmament/demobilisation/repatriation* of ex-FAR and Interahamwe combatants based in Congolese territory. (UR Annexes 81, 91.)

CHAPTER III

REAFFIRMATION OF THE LEGAL ARGUMENTS

236. The purpose of the present chapter of the *Rejoinder* is to rebut the legal arguments presented in the *Reply* in response to the legal justifications advanced by Uganda in her *Counter-Memorial*. In the first place, Uganda considers it appropriate to reaffirm the legal justifications thus presented. Recent developments in international relations have confirmed the serious dangers resulting from the harbouring of groups hostile to other states, whether neighbouring target states or otherwise.

237. The assessment of issues of self-defence must always be contextual and the application of the legal criteria to the facts must be attended by considerations of what is reasonable in all the political and geographical circumstances. The relevant political circumstances will necessarily include the general pattern of relations between the harbouring state and the target of armed bands. Such circumstances will also include the activities and attitudes of third states, and, in the present case, the role of the Government of Sudan.

238. In what follows, the emphasis is upon legal considerations, but the Court's attention is respectfully drawn to the importance of the facts and the need to appreciate the circumstances which faced the Republic of Uganda over a long period of years and involving successive Congolese administrations.

A. **The Assertion Of The DRC That There Was No Aggression On The Facts For Which She Was Responsible**

239. A considerable section of the *Reply* is devoted to the assertion that there was no aggression on the facts for which the DRC was legally responsible. (DRCR, paras. 3.04-3.115.) At the outset the Republic of Uganda rejects this assertion. The evidence has been rehearsed in considerable detail in the *Counter-Memorial*, Volume I, at pages 1 to 75, and in Chapter

II of the present *Rejoinder*. (UCM, paras. 1-101; *supra*, paras. 64-88.)

240. Apart from the assessment of the evidence as such, the assertion of the DRC is substantially undermined by a series of major considerations. In the first place, the factual arguments to the effect that the DRC “was not involved in” armed attacks are divorced from the definitions of aggression carefully rehearsed in the *Counter-Memorial* of Uganda.

241. In particular, the *Counter-Memorial* provides evidence of the existence of an alternative view according to which the giving of logistical support to armed bands with knowledge of their objectives may constitute an armed attack. (UCM, paras. 350-58.) Moreover, there can be no doubt that a State incurs state responsibility for harbouring armed bands on its territory when it has the knowledge, or means of knowledge, that such armed bands are carrying out activities against neighbouring states.

242. The key point is that the DRC is setting the legal standard too high in insisting that there must be either evidence of involvement in particular armed attacks (DRCR, paras. 3.12-3.17), or evidence of involvement in the organisation and functioning of the irregular forces. (DRCR, paras. 3.18-3.24.) Much of the argument in Chapter III of the *Reply* has its foundation in these faulty legal premises.

243. In the second place, the pertinent section of the *Reply* contains a long series of admissions against interest. The first of these admissions appear in paragraph 3.10 as follows:

3.10. Toute l'argumentation de l'Ouganda repose sur le postulat que la RDC aurait été impliquée dans les actions de forces irrégulières opérant principalement à partir de la région frontalière séparant les deux pays. Pour bien comprendre cet aspect du litige, il faut avant tout rappeler que la zone dont il est question a toujours été le repère de mouvements irréguliers agissant à

*l'encontre des gouvernements tant du Congo puis du Zaïre, d'une part, que de l'Ouganda d'autre part. Aucun des deux Etats n'a jamais réussi à contrôler durablement cette frontière au relief accidenté, avec pour conséquence que les Monts Ruwenzori ont traditionnellement été utilisés comme bases arrières par les factions armées d'obédiences très diverses.*⁷¹

(DRCCR, para. 3.10.)

244. A further series of admissions appears in paragraphs 3.13 to 3.14, as follows:

3.13. En premier lieu, il serait totalement erroné de penser que les attaques de mouvements rebelles ougandais ont débuté à la fin de 1997 ou au début de 1998, voire au mois de mai, juin ou août de cette année, soit à l'époque où, selon la partie ougandaise, ces mouvements auraient commencé à obtenir le soutien des autorités de Kinshasa. En réalité, les attaques de rebelles ougandaise se sont poursuivies depuis de très nombreuses années.

3.14. Ces attaques se sont notamment poursuivies pendant la période où les autorités ougandaises appuyaient résolument le mouvement dirigé par Laurent-Désiré Kabila lors de la guerre

⁷¹ "3.10. Uganda's entire argument is based on the premise that the DRC was involved in the acts of the irregular forces operating mainly around the border area between the two countries. In order to understand this aspect of the case, it must first and foremost be remembered that the area in question has always been the theatre of irregular rebel movements acting against both the governments of Congo and Zaire on one hand, and of Uganda on the other. None of the two States has ever been able to sustainably control this border whose terrain is uneven. Consequently, the Rwenzori Mountains have traditionally been used as bases for various types of armed factions."

civile au Zaïre qui a mené au renversement du Maréchal Mobutu. Pour ne reprendre qu'un exemple, le 19 mai 1997, on signale ainsi que l'ADF opère à partir des Monts Ruwenzori tandis que, plus au nord, des attaques de la L.R.A. sont signalés, faisant 48 victimes. Ainsi donc, au moment même où le mouvement mené par Laurent-Désiré Kabila et les autorités de Kampala entretiennent les relations les plus étroites, les rebelles ougandais sont en mesure de mener ou de poursuivre des actions militaires à travers la frontière.⁷²

(DRCR, paras. 3.13-3.14.)

245. In paragraphs 3.15 and 3.16, it is also accepted that the position remained the same even after the fall of Mobutu. This is a key element in the development of the history of relations up to August 1998, as Uganda demonstrated in her *Counter-Memorial*. The relevant passages are as follows:

3.15. Cela n'a, fort logiquement, pas changé avec l'installation du nouveau régime à Kinshasa. Comme elles l'ont toujours fait dans le passé, les forces de l'ADF ont

⁷² "3.13. To begin with, it would be totally false to think that the attacks by the Ugandan rebel movements began at the end of 1997 or at the beginning of 1998, or in May, June or August 1998, that is, according to the Ugandan authorities, the time when these movements began getting assistance from the Kinshasa authorities. In reality, the attacks by Ugandan rebels began many years earlier.

3.14. These attacks, in particular, took place at the time when Ugandan authorities resolutely supported the movement led by Laurent Désiré Kabila during the civil war in Zaire which led to the overthrow of Marshal Mobutu. For example, on 19th May 1997, it was reported that the ADF was operating in the Rwenzori Mountain ranges while, in the north, the LRA made attacks in which 48 people died. Thus, even at the time when the movement led by Laurent Désiré Kabila and the Kampala authorities had the closest relations, the Ugandan rebels carried out military attacks at the border."

continué de se réfugier en territoire congolais. Dès le mois de mai 1997, il semble d'ailleurs que certains membres des ex-FAZ (Forces armées zaïroises) et ex-FAR (Forces armées rwandaises) se sont joints à cette force rebelle. L'ADF gagne alors momentanément des positions dans l'ouest de l'Ouganda, et ses opérations se poursuivent de plus belle.

3.16. Absolument rien n'indique que les nouvelles autorités congolaises soient impliquées dans ces attaques. En réalité, le renversement du régime du Maréchal Mobutu ne paraît guère avoir modifié la situation sur le terrain en Ouganda. Les différentes forces rebelles maintiennent leurs activités pendant toute la période qui fait l'objet de notre analyse. Les exemples suivants, qui ne prétendent nullement à l'exhaustivité, en attestent à suffisance:

- pour ce qui concerne les membres de la Lord Resistance Army (L.R.A.), on signale des actions militaires en juillet, en août, en septembre, en octobre, en novembre 1997. En octobre, on estime que ces attaques ont causé la mort de près de 700 civils pour l'année 1997. Le mouvement se poursuit l'année suivante, en janvier, février, ou mars. D'autres attaques se répètent ensuite, une 'offensive majeure' étant signalée en mai 1998.*
- On signale par ailleurs des attaques du West Nile Bank Front (WNBF), ou de l'UNRF-II (Uganda National Rescue Front II) pendant cette période.*
- Les attaques de l'Alliance of Democratic Forces (ADF) se poursuivent elles aussi.*

On peut en relever pratiquement chaque mois. L'ADF aurait également mené des attentats dans la capitale. Le 8 juin 1998, l'ADF mène une attaque sanglante en massacrant de près de 80 étudiants dans le collège technique de Kishwamba.⁷³

(DRCR, paras. 3.15-3.16.) In these paragraphs from the *Reply* the DRC admits the activities of the named groups on its territory but fails to appreciate the legal context. Even if the DRC did not directly participate in such attacks (which is not admitted by Uganda), the DRC still bears State responsibility for tolerating the activities of these groups of which it had knowledge or the means of knowledge. (*Cf. the Corfu Channel Case* (Merits).)

⁷³ “3.15. Logically, that did not change with the take over of power by the new regime in Kinshasa. As they had done in the past, the ADF continued to take refuge on Congolese territory. From May 1997, it seems that certain members of the ex-FAZ (Zairean Armed Forces) joined this rebel force. The ADF thus momentarily captured areas in Western Uganda, and its operations are continuing strongly.

3.16. Nothing shows that the new Congolese authorities were involved in these attacks. Marshal Mobutu’s overthrow does not seem to have changed the situation on the ground in Uganda. The different rebel forces maintained their activities during the entire period that we are analyzing. The following examples, which are not at all exhaustive, clearly show this:

- Concerning the Lord’s Resistance Army (LRA), military rebel attacks were reported in July, August, September, October and November 1997. In October, it was estimated that these attacks had caused the death of almost 700 civilians in 1997. The attacks continued in the following year, in January, February and March. Other attacks took place, while a major offensive was reported in May 1998.
- Furthermore, attacks by the West Nile Bank Front (WNBF), or UNRF II (Uganda National Rescue Front II) were also reported during this period.
- The attacks by the Allied Democratic Forces (ADF) also continued. They took place almost every month. The ADF is also alleged to have carried out attacks in the capital city. On 8th June 1998, the ADF made a bloody attack by massacring about 80 students of Kichwamba Technical College.”

246. In the same chapter, the DRC also emphasises the significance of “[l]es actions menées par la RDC pour assurer la sécurité à ses frontières.”⁷⁴ (Heading before DRCR, paras. 3.26-3.43.)

247. The chronology of this section of the *Reply* is significant. The security problems chronicled started in 1994 and the DRC’s version of events ends in August 1998. There is a degree of correspondence here between the material presented in the *Counter-Memorial*, Chapters I, II and III, and the chronological segments used in the *Reply*. The correspondence works out as follows:

248. (i) *Reply*: The problems in Kivu 1994-1998, paragraphs 3.29 to 3.32, and the *Counter-Memorial*, paragraphs 11 to 32.
- (ii) *Reply*: Other Security Problems, paragraphs 3.33 to 3.34, and the *Counter-Memorial*, paragraphs 33 to 51.

249. The Court will find that the factual account provided in the *Counter-Memorial* is much fuller than that of the *Reply*, and also more coherent, better documented and generally much more cogent. However, for present purposes, the significance of the passages in the *Reply* noted above, is the confirmation they provide of the persistent activity of armed groups in the border areas of the Eastern Congo. This confirmation is no less cogent by reason of the absence of reference to the extent to which the authorities of the DRC gave direct assistance to the armed groups. (*Supra*, Ch. II, paras. 64-77.)

250. In the same section of the *Reply* there is a description of the co-operation between the DRC and Uganda in dealing with problems of border security in the period September 1997 to April 1998. (DRCR, paras. 3.37-3.41.) The same subject matter was, of course, carefully examined in the *Counter-Memorial*. (UCM, paras. 334-40.) When these two versions of the problem of border security are compared, it will be seen that

⁷⁴ “[t]he actions taken by the DRC to ensure security at her borders.”

the version given in the *Reply* fails to record the threats to the security of Uganda and its citizens which developed after the Protocol concluded on 27th April 1998.

251. The deterioration in the period post-April 1998 is examined fully in the *Counter-Memorial*. (See UCM, paras. 38-42, 44-51, 360-71.) It is unfortunate that the *Reply* ends the pertinent narrative abruptly (in April 1998) at paragraph 3.41.

252. The efforts of the DRC to misrepresent the actions and policies of Uganda in the relevant historical period lead the Applicant State to resort to somewhat tangential methods of proof. (DRCR, paras. 3.44–3.67.) This section of the *Reply* is concerned to establish two, rather different, propositions. First, that “Uganda did not make any official protests against the Congolese authorities.” (DRCR, para. 3.44.) And, secondly, that the Ugandan Government “has never, before the present case began, accused its Congolese counterpart of armed aggression.” (DRCR, paras. 3.46, 3.47 *passim*.)

253. As a preliminary step, it is necessary to establish that the legal question is not whether Uganda made protests, or made accusations of aggression. The legal question, appropriately formulated, is whether there is adequate evidence of a pattern of acquiescence by Uganda in face of the policies of the DRC and the resulting substantial threats to the security of Uganda. The evidence of such acquiescence necessarily includes all the expressions of the position of the Government of Uganda and cannot be restricted to the incidence of formal protests.

254. In fact, the evidence available shows that at appropriate junctures the Ugandan Government made its views very clear, whether in the form of speeches in the political organs of the United Nations or in other public statements. The evidence offered in the *Reply* will now be examined (for this purpose, the rubrics employed in the *Reply* will be utilised).

(1) *May 1997–April 1998*

255. In this period there was a system of joint co-operation in place. (UCM, paras. 288–97.) The text of the *Reply* recognises this. (DRCR, paras. 3.47–3.49.) It goes without saying that this system of co-operation involved the consent of the DRC. The joint regime for maintenance of border security was abandoned when, in the months of July and August, the system had ceased to work effectively as a consequence of changes in the policies of President Kabila. In the context of the period of co-operation there was clearly no call for protests.

(2) *May 1998–July 1998*

256. In this period, there were no formal protests. The reason for this was no doubt the *relative* absence of specific incidents. However, the situation was changing for the worse and the *Reply* recognises that “*au début du mois de mai 1998...certaines critiques semblent avoir été émises à l’encontre de la RDC.*”⁷⁵ (DRCR, para. 3.50.)

257. The DRC recognises that the Ugandan Government did not seek to exacerbate the situation and the *Reply* refers to the fact that the appalling atrocity at Kichwamba College on 8 June 1998 did not cause President Museveni to accuse the DRC of responsibility. (DRCR, para. 3.53.) This fact is by no means decisive in legal terms and the absence of protest does not remove the illegality of such acts.

(3) *August–September 1998*

258. In this period, no formal protests emanated from Uganda. However, the DRC acknowledges that a number of public statements were made in which President Museveni made very explicit complaints about the threats to Uganda’s security emanating from the territory of the DRC. (DRCR, paras. 3.56–3.61.)

⁷⁵ “at the beginning of May 1998... certain criticisms were for the first time made against the DRC.”

259. The key statements made by President Museveni were as follows:

- (i) Statement of 24 August 1998, quoted in the *Reply* at paragraph 3.59; and
- (ii) Press Release, State House, 16 September 1998, quoted in the *Reply* at paragraph 3.59.

260. The attitude of the Ugandan Government was described in the General Assembly of the United Nations by the Hon. Minister of State for Foreign Affairs on 23 March 1999, as follows:

As the situation of rebellion in the Democratic Republic of the Congo worsened, President Kabila -- like his predecessor, Mobutu -- went to Khartoum and worked out a deal with President Al-Bashir of the Sudan for the latter to step up support to the Ugandan rebels on the territory of the Democratic Republic of the Congo. Indeed, after that more Ugandan rebel groups were mobilized by the Sudan and moved to the Democratic Republic of the Congo. The support to Ugandan rebels by President Kabila's Government has itself since become evident. The Uganda Peoples Defence Forces and the Congolese rebels have captured many Ugandans belonging to the different rebel groups operating inside the Congo. The Lord's Resistance Army, the Uganda National Rescue Front, the West Nile Bank Front, the Allied Democratic Forces, which I have just mentioned, and the former Uganda Army, under the command of Idi Amin's son, Taban Amin, are now part and parcel of the pro-Kabila armed alliance led by Zimbabwe. This is in addition to the *génocidaires* of Rwanda, the *interahamwe* and the former FAR. These

are criminal gangs that have inflicted untold misery on the people of Uganda. They attacked, for example, Kichwamba Technical College in western Uganda in June 1998. The students were locked inside their dormitories, which were then doused with petrol and set on fire. Those who tried to escape were gunned down. More than 50 students were burnt to death, and more than 100 of the survivors were abducted.

It would have been a grave omission of its national duty if the Uganda government had not taken appropriate measures to address this threat against our national stability.

(UCM Annex 42, pp. 14-15.)

261. This detailed statement, involving a retrospective assessment of the facts, provides unequivocal evidence of the long-term position of Uganda subsequent to the breakdown of the system of joint action for maintaining border security.

(4) *October 1998–June 2000*

262. In this section of the *Reply* the DRC acknowledges that, in the pertinent time frame, the Ugandan Government had made specific complaints about the harmful policies of the DRC on at least six occasions. (DRCR, paras. 3.62–3.67.) The occasions were as follows:

- (i) Statement by Presidents Museveni and Kagame, early October 1998 (DRCR, para. 3.63);
- (ii) Statement by President Museveni, 14 October 1998 (*ibid.*);
- (iii) Letter to the Security Council from the Ugandan Government, 15 December 1998 (UCM Annex 32, pp. 4-7);

- (iv) Statement of Minister of State for Foreign Affairs in the UN General Assembly, 23 March 1999 (UCM Annex 42);
- (v) Letter to the Security Council from the Ugandan representative, 8 September 1999 (UCM Annex 48); and
- (vi) President Museveni, speech to the Ugandan Parliament on 28 May 2000 (UCM Annex 66, p. 6).

263. The DRC suggests that these expressions of opinion, at the highest level, do not count because they do not involve a “formal accusation of aggression” or refer to a “real armed aggression.” (DRCR, paras. 3.63, 3.64 *passim*.) But, of course, this is irrelevant because the relevant passages provide clear evidence of the general opinion of Uganda. The overall effect is at least the equivalent of a series of protests.

264. The documents available establish that there is no evidence of a pattern of acquiescence on the part of Uganda in the delictual conduct of the DRC. The evidence presents instead a pattern of consistent complaint and resentment. The fact that no “formal accusation of aggression” was made is surely beside the point.

265. It may be recalled that in the *Corfu Channel* case the Court relied on various circumstances in order to determine the attitude of Albania in respect of its territorial waters. (See I.C.J. Reports, 1949, pp. 18-20.) It is a matter of common sense that all the evidence be taken into account, and not merely the incidence of formal protests.

B. The Conditions Necessary For The Legal Justification Of Self-Defence

266. The relevant section of the *Reply* relating to the question of self-defence complains that the *Counter-Memorial* did not “respond directly” to the arguments presented in the *Memorial*, but contradicted the arguments. (DRCR, para. 3.117.) Uganda

considers that she did respond to the *Memorial* as far as this was possible, given the substantial inadequacies of that document.

267. In any case, States are allowed to determine the modalities of pleading, and in relation to the definition of aggression and associated matters, Uganda considered it necessary to establish her own position on these matters. Thus, the subject was dealt with, and dealt with carefully, at pages 190 to 216 of the *Counter-Memorial*. (UCM, paras. 341-371.) The Government of Uganda provided a much more substantial account of the subject than did the DRC in Chapter V of the *Memorial*.

(1) *The definition of armed attack*

268. In any event, the DRC takes the view that the two parties agree on the legal notion of armed attack within the meaning of Article 51 of the Charter. (DRCR, para. 3.118.) This is only true up to a certain point. In fact, the *Counter-Memorial* was careful to indicate an alternative view according to which the position of the majority of the Court in the *Nicaragua* case was excessively narrow. (UCM, paras. 350-54.) The *Reply* evinces some shock that Uganda should point to such alternative views and appears to forget that the Court does not adhere to a rigid doctrine of precedent. Article 59 of the Statute of the Court prevents the Court “from treating its previous decisions as binding ...” (See *Oppenheim’s International Law*, Vol. I, 1992, p. 41; Hersch Lauterpacht, *The Development of International Law by the International Court*, London, 1958. pp. 8-15.)

269. In any event, it must be obvious that the concept of self-defence, even in the context of Article 51 of the Charter, involves a necessary power of appreciation involving reference to contemporary standards of reasonableness and the regional context. In the present case, the regional context consists of the political history of the DRC and the persistent turbulence in eastern Congo.

270. In the opinion of Uganda, in view of the content of the *Counter-Memorial*, and the content of the *Reply*, relating to the

topic of self-defence, the parties have now joined issue sufficiently, and there is no point in repeating the arguments. Uganda reaffirms the materials presented in the *Counter-Memorial* and the related propositions at pages 210 to 216. (UCM, paras. 359-371.) In particular, Uganda reaffirms the following passage:

359. The results of this survey of the most authoritative legal sources can be formulated as follows. For the purposes of applying the provisions of Article 51 of the Charter, the concept of an “armed attack” includes the following elements, taken both separately and cumulatively:

- (a) The sending by a State of armed bands to the territory of another State in conditions in which, had the operation been carried out by regular armed forces, it would have been classified as an armed attack (rather than as a mere frontier incident).
- (b) The sponsoring of armed bands by a State by the provision of logistical support in the form of weapons, training or financial assistance; in these circumstances, and in the presence of a shared purpose, the armed bands become agents, or “*de facto* organs,” of the sponsoring State.
- (c) The operations of armed groups which form part of the command structure of the armed forces of the State concerned, whatever the nomenclature used to describe individual units.
- (d) In other circumstances in which there is evidence of a conspiracy between the State concerned and the armed bands fighting against the State taking action in self-defence.

(UCM, para. 359.)

271. This being the position of Uganda at this stage, there is nothing to be gained from a detailed response to the various debating points raised in the *Reply* at paragraphs 3.123 to 3.152.

272. Many of these debating points would, in any event, be found to lack adequate legal foundations. The reference to Article 8 of the Articles adopted by the International Law Commission on State Responsibility can be taken as an example. (DRCR, para. 3.131.) Article 8 is not, of course, concerned with self-defence, and does not have the effect of placing constraints upon the provisions of the U.N. Charter. Article 59 of the Articles provides: "These articles are without prejudice to the Charter of the United Nations." Reference should also be made to the Commentary to Article 21 as adopted by the Commission.

273. Other points made are rather eccentric. The DRC is very exercised by the fact that the *Counter-Memorial* invokes the practice of the United States. (DRCR, para. 3.140.) But it is a part of the relevant materials. The DRC suggests that Uganda adopted a different position in the "Group of 13." (*Ibid.*) However, even if this were the case, the principle of estoppel does not attach to propositions of law as opposed to statements of fact. (*See* Bowett, *British Year Book*, Vol. 33, 1957, p. 176.) It is, of course, permissible for a State to change its opinion on matters of law.

274. A third example can be taken. In her *Reply*, the DRC challenges the view that conspiracy can constitute an armed attack. (DRCR, paras. 3.145-3.150.) Once again, the DRC's draftsmen evince a degree of shock. But the shock could have been ameliorated by an infusion of legal reasoning. The provisions of the United Nations Charter, and the elements of the definition of aggression, are to be applied within the context of general international law and the principles of State responsibility. The concept of conspiracy is clearly recognisable as a general principle of law of relevance to the application of the principles of State responsibility. Nothing in the Articles on State Responsibility precludes the application of the concept of conspiracy.

275. In this context the observations of Professor Dinstein may be recalled:

As observed by R. Ago, in a report to the International Law Commission, when a State “encourages and even promotes” the organisation of armed bands against another State (i.e. if it provides them with weapons, training or financial assistance), the bands may be considered “*de facto* organs” of the State. The International Law Commission stated that whenever individuals or groups in fact act on behalf of a State, their conduct is attributed to that State and is considered an act of State under international law. Arms shipments alone may not be equivalent to an armed attack. But when the overall policy of the Arcadian Government discloses that it conspires with armed bands fighting against Utopia, Arcadia is definitely committing an armed attack.

(Dinstein, *War, Aggression and Self-Defence*, Cambridge, 1988, p. 190 (footnotes omitted).)

276. It is unfortunate that the *Reply* does not find it necessary to offer a detailed examination of the views of this significant authority. They can be found in the *Counter-Memorial*, pages 199 to 201. (UCM, para. 349.)

(2) *The question of proportionality*

277. This question of responsibility for conspiracy is of relevance in these proceedings because the role of Sudan, in co-operation with the DRC, generates responsibility on the part of the DRC. The role of Sudan has been described above in Chapter II. (*Supra*, paras. 78-88.) It is clear from the evidence available that the Sudanese forces were in the DRC as a result of a licence from the Government of the DRC and with the joint purpose of using the armed groups in eastern Congo to destabilise Uganda.

278. The *Reply* makes the assertion that Uganda did not make a necessary and proportionate response. (DRCR, paras. 3.159-3.184.) The element of proportionality forms a part of the concept of self-defence and this position is shared by both parties. (DRCR, para. 3.159.) The essence of the matter is, of course, the application of the principle to the facts of the particular case. Uganda affirms her position that the action taken on the territory of the DRC constituted lawful self-defence, and adheres to her account of the circumstances provided in Chapter XVII of the *Counter-Memorial*, and, in particular, the problems of border security described at pages 181 to 190, and also at pages 211 to 216. (UCM, paras. 334-340, 360-371.)

279. It will be convenient, for the purpose of rebuttal, to adopt the headings used in the *Reply*.

(a) The official justification put forward by the Ugandan authorities

280. In this section of the *Reply* the DRC refers to a series of statements made on behalf of the Government of Uganda, which, the DRC accepts, provide information as to “the official objective” of the action taken by Uganda. (DRCR, para. 3.163.) The objectives revealed in the statements quoted are as follows:

- First: The need to combat ADF and other lawless elements in DRC territory near to Uganda in the Rwenzori district;
- Second: The need to prevent acts of destabilisation emanating from DRC territory;
- Third: The need to deal with anti-Uganda terrorists from Sudan in transit through the DRC;
- Fourth: The need to neutralise remnants of the supporters of Idi Amin;

- Fifth: To demobilise elements of the Interahamwe and ex-FAR and to prevent them from terrorising areas within Uganda; and
- Sixth: To protect Uganda from invasion by Kabila's forces.

281. The DRC in this section accepts that these are the official objectives of Uganda. (DRCCR, paras. 3.162-3.164 *passim*.) The text makes insinuations of other purposes but does not produce proof. The context of this material, it is to be recalled, is the issue of proportionality. The DRC has summarised the case for necessary action in the months after August 1998 rather well.

282. The elements which are relevant to any appreciation of the proportionality of Uganda's actions including the following:

- (i) The absence of any stable State structure in the eastern provinces of Congo;
- (ii) The alliance between President Kabila and other agencies, and particularly the Sudan, which were hostile to Uganda;
- (iii) The long history of terrorism and aggression by armed bands established on the territory of the DRC and the appalling effects of that aggression against the population of Uganda, as in the atrocity at Kichwamba on 8 June 1998;
- (iv) The results of the formation of the military alliance between President Kabila and Sudan are described in the *Counter-Memorial* at pages 30-32. (UCM, paras. 38-41.) The extent of the Sudanese involvement is described in Chapter II above. (*Supra*, paras. 78-88.) The Sudanese forces were located in a series of bases in northern Congo and their presence, and the existence of a Sudanese-

related command structure, was the subject of a licence from the DRC;

- (v) The appearance of Sudanese armed forces in the DRC was a new and serious threat to Uganda's territorial integrity, especially in light of Sudan's long history of aggression against Uganda, her stepped-up role in training and delivering matériel to the FAC and anti-Uganda insurgents, her efforts to rally other States, including Chad, against Uganda, and all the other steps set forth in Chapter II hereof;
- (vi) The complicity of the DRC in these activities or, in some cases, the incapacity of the DRC authorities to deal with the persistent threat to the territory and population of Uganda; and
- (vii) The cumulative effect of these various types of threats.

283. The decisive circumstance is the long-term absence of any, or of any effective, State administration in eastern Congo. This is evidenced by the record and is admitted by the DRC in its *Reply*. (See, e.g., DRCR, para. 3.10, 3.98.) This was the relatively unusual situation which confronted Uganda, and this background should not be ignored by the Court.

284. The statements by Uganda of the necessity for action are not legalistic in style but they are clear in content. Moreover, the *cumulative* effect is considerable, not least when the question to be addressed is that of necessity and proportionality. Moreover, it is surely necessary to recognise that a State in the position of Uganda must have the benefit of a margin of appreciation in relation to the dimensions of the perceived threat and the means of dealing with that threat effectively.

(b) The alleged absence of protest, notice or prior ultimatum

285. The DRC contends that the commencement of Uganda's military intervention without any protest, notice or prior ultimatum shows that there were alternative ways to the use of force. (DRCR, paras. 3.165-3.167.) This is a naïve view of the facts and ignores the long-term character of the turbulence in the border areas and the resulting persistent threats to the territory of Uganda. The long-term threat to security has been described in the *Counter-Memorial* at pages 181 to 187 (*See also* pp. 187-90 on the short-term threat.) (UCM paras. 334-340.)

286. And in this context, the DRC in the *Reply* recognises the threats which existed over a long period: this recognition occurs in paragraph 3.98, as follows:

En premier lieu, les sources neutres et objectives n'établissent nullement que le Zaïre ait été impliqué dans des attaques militaires menées par des forces rebelles ougandaises. Personne ne nie que, comme de tout temps, ces forces ont à cette époque traversé la frontière et possédaient certaines de leurs bases des deux côtés de celle-ci. Ainsi, un rapport établit que, durant les dernières années de la présidence Mobutu, "Anti-Museveni forces (the Allied Democratic Forces, the Lord Resistance's Army and the West Nile Bank Front) were using Congo as a rear base from which to launch attacks against Uganda." Cela s'explique très facilement par les difficultés de contrôler cette zone, comme l'admet d'ailleurs le contre-mémoire ougandais: "They were able to operate unimpeded in this region because of its mountainous terrain, its remoteness from Kinshasa (more than 1,500 kilometers), and the almost complete absence of central government

presence or authority in the region during President Mobutu's 32-year term in office."⁷⁶

(DRCR, para. 3.98; footnotes omitted.)

287. The events relate to the period up to 1997, and the *Reply* is here confirming the long-term nature of the threat.

288. As to the alleged lack of protest or ultimatum, the evidence of the attitude of the Government of Uganda must be examined as a whole. There is, in fact, ample evidence of the general position of Uganda in face of the persistent threats. (*Supra*, paras. 253-65.)

(c) The alleged extent of Uganda's "occupation"

289. The DRC asserts that the extent of Uganda's "occupation" of Congo's territory shows that the means used were not proportionate. (*See* DRCR, paras. 3.168-3.172.) The extent of Uganda's presence was functional. In other words it was directly related to the logistical and military needs of neutralising the bases which were available to Sudan in moving men, and aircraft, into the DRC. The situation which faced Uganda in September 1998 is described in detail in the *Counter-Memorial* at pages 37 to 43 (UCM, paras. 47-54), and is reiterated in Chapter II above. (*Supra*, paras. 64-88.) The location of Ugandan forces was dictated by the necessity to drive the Sudanese forces from eastern and northeastern Congo, and to take control of a series of major military airfields, as follows (from east to west): Isiro, Buta, Bumba, Lisala, and

⁷⁶ "First of all, neutral and independent sources do not show anywhere that Zaire was involved in military attacks carried out by the Ugandan rebel forces. Nobody can deny the fact that, like in other times, during this period, these forces used to cross the border and had bases on both sides of the border. Thus, a report established that, during the last years of Mobutu's presidency, 'Anti Museveni forces (the Allied Democratic Forces, the Lord's Resistance Army and the West Nile Bank Front) were using Congo as a rear base from which to launch attacks against Uganda.' This was because this area is very difficult to control, as the *Counter-Memorial* itself admits:"

Gbadolite. The territorial extent of Ugandan control was thus limited to the joint purposes of terminating the threat posed by the Sudanese forces and the associated actions against the insurgents operating in alliance with the Sudanese armed forces and the DRC armed forces. (*Supra*, Ch. II, paras. 170-77.)

(d) The alleged duration of Uganda's "occupation"

290. The DRC also asserts that the duration of Uganda's "occupation" is evidence that the means used by Uganda were not proportionate. (DRCR, paras. 3.173-3.177.) In fact, the duration of the presence of Ugandan forces was directly related to the defensive objectives indicated in the previous paragraph. In any event, once the Lusaka Agreement of 10 July 1999 was in force, the provisions of the Agreement established a comprehensive peace process which encompassed a regime of agreed withdrawals. (*Supra*, Ch. II, paras. 213-26.)

(e) The modalities of Uganda's military action

291. A further contention advanced in the *Reply* is to the effect that an analysis of the "modalities" of Uganda's military action shows that the means used by Uganda are not proportionate. (DRCR, paras. 3.178-3.180.)

292. In this context the DRC makes three separate assertions. The first refers to the DRC's accusations that Uganda provided support to several rebel movements. (DRCR, para. 3.178.) This aspect of the case has been examined in detail above in Chapter II (*supra*, paras. 156-60, 180-210), and there is no sufficient evidence to suggest that the purpose of the actions of Uganda had the motivation suggested in the *Reply*.

293. The second separate assertion advanced in the *Reply* refers to the general complaint by the DRC concerning the alleged exploitation of natural resources. (DRCR, para. 3.179.) This subject is examined in detail in Chapter IV below. Uganda denies these allegations on the facts. However, it is also appropriate to point out that illegal actions by individual members of the armed forces would not, as a matter of law and

commonsense, deprive the action taken of its character as action by way of self-defence.

294. Finally, the DRC invokes her allegations concerning human rights violations. This subject is examined in detail below in Chapter V. Uganda denies these allegations on the facts. Moreover, as stated already, it is appropriate to point out that illegal actions by individual members of the armed forces would not, as a matter of law and commonsense, deprive the action taken of its character as action by way of self-defence.

(f) The relevance of the Security Council Resolutions

295. In the *Reply* the DRC asserts that the content of certain Security Council resolutions confirms that the measures taken by Uganda were “*pas ‘nécessaires’ au sens de l’article 51 de la Charte.*”⁷⁷ (heading, DRCR, paras. 3.181-3.183.)

296. In this section, the DRC relies upon a series of arguments which simply lack a legal foundation. In the first place, the wording of Article 51 of the Charter does not preclude either the Court or the political organs from making the necessary determinations of fact, and its application depends upon such determinations of fact. The article is not self-executing.

297. In the second place, the Court, as the principal judicial organ of the United Nations, has an autonomous responsibility for the settlement of disputes. The role of the political organs in this respect has been examined in some detail in the *Counter-Memorial*, Chapter IX at pages 111 to 120, and the Court is respectfully referred thereto. (UCM, paras. 188-206.)

298. The Government of Uganda affirms the positions adopted in Chapter IX of the *Counter-Memorial*.

⁷⁷ “ not ‘necessary’ within the meaning of Article 51 of the United Nations Charter.”

C. The Issue Of The Consent Of The DRC

299. The issue of consent was examined by Uganda in Chapter XVI of the *Counter-Memorial*. (UCM, paras. 288-328.) This examination was detailed and comprehensive and its general content is reaffirmed. (*See also supra*, Ch. II, paras. 89-99, 213-26.) In her *Reply* the DRC raises a number of specific issues which will now be dealt with by way of rebuttal.

(1) *The assertion that Uganda cannot invoke the rules which govern the responsibility of States*

300. This strange assertion simply means that a justification based upon consent can only apply within the limits of the consent. (DRCM, para. 5.38; *see also* Article 20 of the Articles on the Responsibility of States (2001).)

301. The contention of the DRC in her *Reply* is, in substance, that the Respondent State cannot invoke self-defence and consent at the same time. (DRCR, paras. 3.185, 3.188.) Two points arise immediately. In the first place, given the complexity of the situation and the evolution of circumstances over a long period, there is no doubt that the two justifications may be material severally in relation to separate periods of time and separate episodes. Secondly, there can equally be no doubt that a military force in place as a consequence of the prior consent of the territorial sovereign will have an ancillary right of self-protection in the light of the nature of its mission.

(2) *The Protocol of 27 April 1998*

302. In the *Reply*, the DRC examines the Protocol of 27 April 1998 in some detail. (DRCR, paras. 3.191-3.201.) In a separate passage (DRCR, para. 3.189) the question is raised as to when the consent embodied in the Protocol was withdrawn. This question was directly addressed in the *Counter-Memorial* (UCM, paras. 288-297) and again in Chapter II above. (*Supra*, paras. 89-99.) In the relevant passages Uganda presents the facts, as far as they are known, concerning the question of the withdrawal of consent. There is a lack of clarity in the facts but that is not of Uganda's making.

303. The DRC, somewhat simplistically, suggests that Uganda is saying that the original consent subsisted without any limit. The ordinary reader of the *Counter-Memorial* would readily appreciate that that is not the position.

304. The precise arrangements resulting from the Protocol have been described in the *Counter-Memorial* at pages 22 to 24, and the Court is respectfully referred to these passages. (UCM, paras. 31-32; *see also supra*, Ch. II, paras. 89-99.) They are based upon the knowledge of Ugandan officials. The *Reply* suggests that part of the text of paragraph 31 of the *Counter-Memorial* is a “fabrication.” (DRCR, para. 3.194.) This unpleasant claim is not supported by any evidence.

(3) *The question whether there was an invitation*

305. The DRC is very exercised by the statement in the *Counter-Memorial* that Ugandan forces had entered Congolese territory “by governmental invitation.” (DRCR, paras. 3.196–3.198.) The picture is described carefully in Uganda’s *Counter-Memorial* at pages 22 to 23 and 161. (UCM, paras. 30-31, 288-291; *see also supra*, Ch. II, paras. 89-99.) The DRC produces arguments flawed by two major misconceptions. The first is that the Protocol of 27 April 1998 was the only form of relationship between the DRC and Uganda -- in fact there was a pattern of relations prior to the Protocol. The second misconception is to fail to recognise that a Government has the right to speak of its own knowledge and that not all developments can be neatly documented.

306. In the outcome, the presence of Ugandan forces was originally based upon a form of informal consent, which antedated the Protocol.

(4) *The assertion that the DRC has not given its informal consent*

307. The *Reply* denies that the DRC gave her informal consent to the presence of Ugandan forces on her territory. (DRCR, paras. 3.202-3.210.) However, no evidence to refute the existence of such consent is presented. There is no

requirement of form regarding the existence of consent in general international law, and the Articles on State Responsibility adopted by the International Law Commission in 2001 do not indicate otherwise. (See Article 20, referring simply to “consent.”)

308. The Government of Uganda is entitled to speak of her own knowledge on this matter. A part of the picture, and an important part, is the fact that the Protocol of 27 April 1998 was the further formal manifestation of a pre-existing informal consent. (DRCM, paras. 30-31, 288-91.)

(5) *The significance of the Lusaka Agreement*

309. The Lusaka Agreement was ignored in the *Memorial*. In contrast, in the *Counter-Memorial* this important instrument was examined in detail and set in the context of the pertinent multilateral and regional diplomacy. (UCM, paras. 299-328.) In the *Reply* the DRC responds, and responds inadequately, to the presentation in the *Counter-Memorial*. (DRCR, paras. 3.211-3.218.) But at least the parties appear to have now joined issue on the Lusaka Agreement.

310. It is obvious that the DRC considers it to be in her interest to belittle the political and legal significance of the Lusaka Agreement and this leads the DRC to adopt indefensible positions on a number of questions. In the first place, in the *Reply* the recognition by the States of the region of the security concerns of Uganda, in face of the endemic civil strife in the DRC, is dismissed as irrelevant. (DRCR, para. 3.211.) This dismissal is unacceptable both as a matter of legal logic and as a matter of political realities.

311. Moreover, as Uganda has demonstrated, the DRC had given explicit recognition of Uganda’s security concerns on several occasions, including the Summit Meeting at Sirte in April 1999. (UCM, paras. 309-314.) In the political context, the Inter-governmental Meeting at Kampala (from 28 May to 1 June 1999) is of considerable evidential value. (UCM, paras. 312-314.) The purpose was to provide modalities for the

implementation of the Sirte Agreement. This Agreement, and the Joint Communiqué signed at Kampala on 1 June, anticipated the formal commitment of the DRC to the multilateral peace process in the Lusaka Agreement.

312. The strong elements of mutuality which underpin the Lusaka Agreement, and the recognition by the DRC of the security concerns of Uganda, are reaffirmed in the Luanda Agreement concluded on 6 September 2002, with the mediation of H.E. President Jose Eduardo Dos Santos of Angola. (UR Annex 84.) The preamble includes the following paragraphs:

Conscious of the need to give impetus to the stalled implementation of the Lusaka Cease-fire Agreement;

Further considering the need to normalize relations, build confidence and bring about good neighbourliness in order to contribute to the speedy pacification of Central Africa and the Great Lakes Region and put an end to insecurity and instability;

Conscious of the potential their joint action can contribute towards removing obstacles to the full normalization of relations between the two countries

(Ibid.)

313. Article 1 then deals with the withdrawal of Ugandan troops. It provides as follows:

1. The GOU commits itself to the continued withdrawal of its forces from the DRC in accordance with the Implementation Plan marked Annex 'A' and attached hereto.
2. The GOU has unilaterally and unconditionally issued orders to her troops in Gbadolite, Beni and their

vicinities to immediately withdraw from DRC.

3. The Parties agree to put in place, with the assistance of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC), a Joint Pacification Committee on Ituri consisting of the Parties, political, military, economic and social forces active in the Bunia area, and the inhabitant grassroots communities. In addition, thereto, Uganda re-affirms her readiness to withdraw her troops from Bunia as stipulated in Annex 'A'.
4. The Parties agree that the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda's security, including training and coordinated patrol of the common border.
5. The DRC and the GOU undertake to keep the Government of the Republic of Angola informed on the progress of the withdrawal of Ugandan troops.

(Ibid.)

314. The content of paragraph 4 of Article 1 above is reinforced by the express recognition of the security concerns of both parties in Article 2. Article 2 is headed "Security Concerns" and provides as follows:

In order to respect national sovereignty, territorial integrity, political independence as well as international borders, the parties agree as follows:

1. To work towards the restoration of the dignity and sovereignty of the DRC as well as address Uganda's security concerns.
2. To refrain from all types of military and logistical support including the provision of bases and sanctuary to the armed groups, inter-ethnic militia, subversive organizations and all rebel movements against the interests of the Parties.
3. To work closely together in order to expedite the pacification of the DRC territories currently under the Uganda control and the normalization of the situation along the common border.
4. To exchange intelligence on all matters of security among them.

(*Ibid.*)

315. The documents discussed in the *Counter-Memorial* make very clear the fact that the peace process involved a waiver of any question of legality of the presence of Ugandan forces, contrary to the assertions in the *Reply*. (DRCR, paras. 3.212-3.215.) In this connection the Court is respectfully referred to the detailed account of the relevant materials in Chapter VI of the *Counter-Memorial*, at pages 51 to 75, and also Chapter XVI, at pages 164 to 179. (UCM, paras. 299-328; *see also supra*, Ch. II, paras. 213-15.) Overall, Uganda devoted forty pages to the significance of the Lusaka Agreement.

316. Apart from the paucity of the discussion of the Lusaka peace process in the *Reply*, there is a persistent reluctance to refer to the precise text of the relevant instruments.

317. A further flaw in the *Reply* is the failure to recognise the elements of reciprocity and complementarity in the Lusaka

Agreement. As the Secretary-General of the United Nations explained in a Report of February 2001 to the Security Council:

The Lusaka Ceasefire Agreement acknowledged the concerns of Rwanda, Uganda and Burundi over the presence of the armed groups which threaten the security of their borders, and recognised that the *withdrawal of Rwandan and Ugandan troops would be linked directly to progress made in the disarmament and demobilization of the militias*. The Agreement called for a mechanism for the disarming of militias and armed groups, including the genocidal forces.

(UCM Annex 84, para. 88; emphasis added.)

318. There are other points made in the *Reply* which, in the opinion of Uganda, lack cogency. They include the following:

- (i) The reference to the deadline for the withdrawal of foreign forces in isolation from the reciprocal conditions relating to duties of compliance (DRCR, para. 3.213);
- (ii) The content of Resolution 1304 of the Security Council. (*Ibid.*) This argument (contained in the *Memorial*) was carefully addressed in the *Counter-Memorial* at pages 60-63 (UCM, paras. 80-86), and the DRC has produced no adequate response. In this and other contexts the DRC should be reminded that it is necessary to study the pleadings of the other party with due diligence;
- (iii) The DRC also contends that the Court refused to hold that Uganda's *counter-claim* based upon breaches of the Lusaka Agreement was admissible has the consequence that Uganda cannot involve the Agreement in the context of the

circumstances precluding wrongfulness. (DRCR, para. 3.216.) What the Court said on the subject was as follows:

42. Whereas, in respect of Uganda's third counter-claim (alleged violations by the Congo of the Lusaka Agreement), it is to be observed from the Parties' submissions that Uganda's claim concerns quite specific facts; whereas that claim refers to the Congolese national dialogue, to the deployment of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) and to the disarmament and demobilisation of armed groups; whereas these questions, which relate to *methods for solving the conflict* in the region agreed at the multilateral level in a ceasefire accord having received the "strong support" of the United Nations Security Council (resolutions 1291 (2000) and 1304 (2000)), concern facts of a different nature from those relied on in the Congo's claims, which relate to acts for which Uganda was allegedly responsible *during that conflict*; whereas the Parties' respective claims do not therefore form part of the same factual complex; and whereas the Congo seeks to establish Uganda's responsibility based on the violation of the rules mentioned in paragraph 38 above, whilst Uganda seeks to establish the Congo's responsibility based on the violation of specific provisions of the Lusaka Agreement; whereas the Parties are thus not pursuing the same legal aims;

43. Whereas the Court considers that the third counter-claim submitted by Uganda

is therefore not directly connected with the subject-matter of the Congo's claims[.]

(Order, paras. 42-43, emphasis added.)

319. In the opinion of Uganda the words of the Court relate exclusively to the issue of admissibility of the counter-claims. This is very clear when the passage is read as a whole, and the determination does not affect the arguments of Uganda relating to the relevance of the Lusaka Ceasefire Agreement to the DRC's claims against Uganda and Uganda's defences to those claims. (*See also supra*, Ch. II, paras. 225-26.)

320. Finally, the DRC contends that in the *Counter-Memorial* Uganda makes admissions which rule out any invocation of the Lusaka Agreement for purposes of legal justification. (DRCR, para. 3.217.) The passages cited by the DRC do not correspond to the question raised. However, and in any event, Uganda denies that there are any passages in the *Counter-Memorial* which have the effect contended for.

CHAPTER IV

RESPONSE TO THE ALLEGATIONS OF ILLEGAL EXPLOITATION OF NATURAL RESOURCES

321. This Chapter responds to the factual allegations in Chapter IV of the DRC's *Reply* concerning alleged looting and illegal exploitation of natural resources.

322. The DRC rests her efforts to vilify Uganda almost exclusively on -- indeed, the DRC often merely parrots -- allegations contained in the April 2001 *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* (DRCR Annex 69) (the "First UN Panel Report" or the "First Report"). That report was so profoundly flawed that the Security Council created a second UN Panel, which in November 2001 drafted an *Addendum to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo* (DRCR Annex 70) (the "Second UN Panel Report" or the "Second Report").⁷⁸ The Second Report, by its own admission, did not solve the errors of the First Report, leading to the preparation of yet another report, the so-called *Final Report on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, submitted only recently in October 2002 (the "Third UN Panel Report").

323. The UN Panel Reports were designed to spur debate in the United Nations Security Council, not to establish liability for any violation of international law, the purpose to which the DRC is now attempting to put the Reports. (*Infra*, paras. 332-38.)

⁷⁸ In locations where the First Report and the Second Report are quoted in this *Rejoinder*, the English versions prepared by the United Nations are used as sources, although the DRC included the French versions as DRCR Annex 69 and DRCR Annex 70, respectively.

324. The UN Panel Reports, and in particular the First Report on which the DRC primarily rests her claims, are inadequate even when their limited purpose is considered. The DRC herself has admitted that the UN Panel Reports are not credible, for they make accusations without any evidentiary basis, fail to understand the context of events, and fail to comprehend when conduct is illegal. Other States have also widely and correctly criticised the Reports for the cavalier manner in which they fail to provide evidentiary support for serious allegations. The Panel Reports rest on unidentified “sources” and “information,” rather than on sworn testimony, documents, and corroborated evidence. Despite frequent requests from Uganda and other States for the evidence supporting the allegations made in the Panel Reports, none has been provided. The UN Panels in this case flatly ignored the evidentiary standards imposed by other UN panels. Because the DRC has constructed her entire case on a sandy foundation, that case must fail. (*Infra*, paras. 339-79.)

325. All of the general deficiencies of the UN Panel Reports infect the particular allegations made against Uganda. Those allegations are not supported by credible evidence, resting instead on uncorroborated “information” from unidentified “sources.” The UN Panels refused to provide supporting information (if any existed in the first place) to authorities in Uganda seeking to investigate the very serious charges made by the Panels. In addition, the UN Panels failed to interview key witnesses or to review publicly available documents, leading to error after error that could easily have been avoided. One clear example of this was the so-called DARA-Forest “case study,” which the First Report highlighted as an example of Ugandan criminal conduct, all of which turned out to be false. (*Infra*, paras. 380-405.)

326. Uganda did not have the capability to exploit the eastern Congo in the manner alleged in the *Reply*. Uganda did not deploy an army of occupation with control over the geography and the economy of eastern Congo, as the DRC contends. Rather, because Uganda entered the DRC only for the limited purpose of self-defence, fewer than 10,000 UPDF troops were stationed at key strategic points to prevent attacks on Uganda by

rebels sponsored by the DRC and Sudan and to stop attacks by Sudan on Uganda. In view of the limited number of Ugandan troops and their limited deployment, the DRC's allegation that the UPDF had the ability to control mining, forestry and other commercial activities is simply wrong. In addition, Uganda's continued presence in eastern Congo was required by international agreement, urged by the UN, and most recently accepted by the DRC, all of which would have been inconceivable had Uganda been engaged in the conduct alleged by the DRC. (*Infra*, paras. 406-13.)

327. The UN Panel Reports also proceed from a number of erroneous premises. The UN Panels began with the preconception that the Ugandan military had learned of, and developed a taste for, the resources of the Congo while fighting alongside rebel forces during the 1996-97 anti-Mobutu insurrection, which is not true. Moreover, in assuming that Uganda would commit vast funds to the occupation of eastern Congo in order to exploit that land, the UN Panels also ignored the fact that Uganda has vast natural resources of her own which (assuming she were free from rebel attacks emanating from the DRC and Sudan) she could develop without the expense of military action in the DRC. In addition, the UN Panels, failing to investigate the actual data, erroneously assumed that Uganda financed her intervention in eastern Congo through the exploitation of the area. Finally, the UN Panels, in assuming that Uganda entered the DRC in order to profit from taxes imposed on the transit and re-export of goods from the DRC, ignored the fact that no such levies could be imposed under the Ugandan tax system. All of the DRC's factual premises are therefore demonstrably incorrect. (*Infra*, paras. 414-29.)

328. In concluding that cross-border trade constituted illegal "exploitation," the UN Panel also ignored the fact that such trade has existed since time immemorial and the fact that the existence of such trade provides no evidence of illegality. Rather than being illegal under international law, such trade provided necessary goods to those who reside in eastern Congo, since that area was cut off from the remainder of the DRC. Such bilateral trade was entirely legitimate and, in fact,

demonstrates that the DRC's allegations of one-way "looting" are absurd. The assertion that commercial activity in eastern Congo was illegal unless licenced and taxed by the DRC Government is also simply wrong. Areas of eastern Congo were held by rebel groups which were the *de facto* governments in those areas, as the July 1999 Lusaka Agreement recognised. Although much commercial activity was licenced by the Government of the DRC (a fact the DRC conceals), *requiring* such licensure would have resulted in poverty and starvation in eastern Congo and would have been morally wrong. In fact, when the current DRC Government was, as the AFDL, in control of territory prior to the overthrow of President Mobutu, it asserted the authority to enter contracts with regard to the exploitation of natural resources in the areas it controlled. (*Infra*, paras. 430-55.)

329. The specific accusations made by the DRC on the basis of innuendo and hearsay have been rebutted by sworn testimony and documentary evidence. Much of the documentary evidence was publicly available, but was either ignored or suppressed by the UN Panels and by the DRC. Other allegations made by the DRC blatantly misread the source documents on which the DRC purports to rely, plucking one or two sentences out of context or concocting allegations which are not made by the source documents. All of the DRC's accusations are rebutted. (*See infra*, paras. 456-94.) In an effort to restore some credibility to the UN Panel Reports, the DRC is ultimately reduced to creating speculative excuses for the many errors contained in that Report. (*See infra*, paras. 504-09.)

330. Allegations that Uganda failed to act against illegal activity are similarly without merit. In the first place, the DRC has failed even now to demonstrate that any illegal activity occurred, much less that such illegal activity was known to Ugandan authorities in the past. The DRC's accusations also rest on the mistaken assumption that Uganda should have punished Congolese nationals in eastern Congo, despite the fact that rebel groups, and not Uganda or the UPDF, had administrative control over that region. The DRC's allegations are, in the end, unfounded slurs against Ugandan officials. (*Infra*, paras. 495-503.)

331. Finally, the DRC fails to understand, or misstates, the governing law. (*See infra*, paras. 510-22.)

A. **The United Nations Panel Reports Were Designed To Provide A Foundation For A Political Solution, Not To Establish Culpability**

332. The DRC is seeking to use the UN Panel Reports out of context. Even had the Panels adhered to all appropriate methodological and evidentiary standards (which they did not, as demonstrated below, *infra*, paras. 339-79), the UN Panel Reports were not expected to assign responsibility or culpability for any illegal activities in the DRC. Rather, the Security Council, at whose behest the Panels were constituted, understood that any report would not reach the very high standards required to attribute responsibility to States, and considered that, at best, the Reports would be the basis for discussing a political solution to the conflict in the DRC. As the Security Council itself noted, the UN Panels were not judicial organs vested with the power or capability to collect and evaluate evidence, form opinions, attribute responsibility, and apportion blame. Rather, the Panels were essentially political organs, vested only with responsibility to suggest political solutions for the problems on the ground.

333. The President of the Security Council, commenting on the work of the First Panel, accordingly stated that:

I want to repeat something that other speakers have noted, because it is essential to our discussion here today, and to the follow-up. Our goal is not to punish or apportion blame; our goal, is and must remain, the successful implementation of the Lusaka Ceasefire Agreement and the relevant Security Council resolutions.⁷⁹

⁷⁹ The Permanent Representative of the United Kingdom, in a similar vein, observed that:

(UR Annex 53 (AM Meeting), p. 10.)

334. The same points were reiterated during the Security Council discussion of the Third Panel Report. The Representative of the Russian Federation emphasised that the purpose of the Panels was not to determine guilt for economic crimes:

My delegation believes that combating economic crime falls, first and foremost, within the purview of States, not the Security Council. Moreover, only a court can determine which individuals or organizations are truly guilty of illegal operations and should be prosecuted.

(UR Annex 106 (AM Meeting), p. 28.)

335. The Representative of Singapore made the same point, explicitly noting the failure of the Panels to meet appropriate evidentiary standards:

However, the Security Council does not have any mechanism to assist it, so as to ensure that the observance of due process and the necessary high evidentiary standards will be the final arbiters before we make our decision on the Panel's recommendations. We will take up this question again when the Council meets next week in informal consultations to discuss the outcome of today's debate. Here, I would like to add that we agree with the Representative of France that our purpose should not be to

We must engage with each other and try to achieve greater clarity, but we also need to focus on the primary goal here, which is not to punish or narrowly to assign blame, but to tackle the problem in the interests of promoting the wider peace process and alleviating the suffering of the Congolese people.

(UR Annex 53 (AM Meeting), p. 21.)

point fingers at anyone but to stop the plundering and to find a way for the Democratic Republic of the Congo to move forward.

(*Ibid.* (PM Resumption), p. 4.)

336. Norway, in a similar vein, recognised that the Panels were useful in contributing to *political* solutions of problems in the region:

We encourage the continuation of the use of panels of experts to assist the Security Council in its work. As is highlighted by the current discussion on the exploitation of natural resources in the Democratic Republic of the Congo, the Panel not only presents its findings and recommendations, but triggers useful discussions involving all relevant actors. It is our belief that this is a contribution towards finding good and sustainable solutions to the problems we are facing in the region.

(*Ibid.* (AM Meeting), p. 26.)

337. The UN Panel Reports did not, however, meet the standards required even for collective *political* action such as trade embargoes against blameworthy countries. During the Security Council deliberations on the Third Panel Report, the Russian Federation made this point most emphatically:

Not all agree with the conclusions and recommendations of the report, including the Russian Federation. However, we must acknowledge that the problem exists and we must take adequate steps to resolve it. That has been borne out by statements made by the representatives of Uganda, South Africa, Denmark, France, Norway and other representatives. In that connection, we are not inclined to consider the report as an

excuse to precipitously adopt measures or decisions, but rather to consider it as food for thought that requires further study.... The establishment of black lists by the Council would not guarantee an end to the illegal operations involving Congolese resources.

(*Ibid.*, p. 27.)

338. If the UN Panel Reports cannot justify *political* action, *a fortiori* they cannot meet the higher standards for evidence which could sustain *juridical* action against a State.

B. The United Nations Panel Reports, And Particularly The First Report On Which The DRC's Case Rests, Have Been Universally Discredited

339. The DRC neglects to point out that the First UN Panel Report on which she so heavily relies was broadly criticised as biased and lacking in credibility, so much so that the failures of the first UN Panel required the appointment of a second Panel. In fact, the First UN Panel Report was explicitly criticised by the DRC, an effective admission of the flaws of that Report. On the few occasions where the DRC does cite the Second Panel Report, which points far less to Uganda than does the First Report, the DRC ignores the fact that the Second Report, like the First, presented conclusions which were not supported by relevant evidence. This failure led to a *Third* UN Panel Report, which suffers from the same flaws as the first two Reports.

(1) *The DRC herself admits that the UN Panel Reports are not credible*

340. The DRC has herself admitted that the UN Panel Reports are not credible. Attacking portions of those Reports which accuse the DRC Government of corruption and serious maladministration (*see* DRRCR Annex 69, paras. 148-172; DRRCR Annex 70, paras. 61-90), the DRC has emphasised at least three major flaws in the UN Panel Reports: first, the Reports make accusations without bothering to understand the

factual context of events; second, the Reports make accusations which are not based on evidence; and third, the Reports do not comprehend what is legal and what is illegal.

341. Attempting to explain away the serious allegations against the DRC Government and its allies, the DRC points out that the UN Panels make allegations without bothering to understand the factual context in which events occurred. The DRC, for example, asserts that conditions on the ground could justify agreements which would otherwise be deemed “controversial” or “insufficiently explicit”:

10. Le Rapport du Panel fait mention de la responsabilité du Gouvernement de la République Démocratique du Congo essentiellement au sujet des contrats signés dans le cadre de l'exploitation du diamant du Kasai, du cuivre et du cobalt au Katanga avec les opérateurs économiques originaires des pays alliés.

11. A ce sujet le Panel des Experts des Nations Unies a ciblé les sociétés suivantes: COMIEZ, COSLEG, BCD, SENGAMINES, SONANGOL, SOCEBO, et différentes autres conventions de partenariat entre la RDC et ses alliés, structures qualifiées de supports de pillage.

.....

20. Que certains des contrats de partenariat entre la RDC et ses alliés comportent des clauses controversées mais imputables au contexte de guerre où sont intervenues leurs signatures, le Gouvernement en est conscient. En effet, il n'a pas d'ailleurs attendu la visite du Panel de l'ONU pour amorcer une action d'évacuation des dispositions contractuelles au demeurant non conformes aux lois régissant les sociétés

*commerciales et à l'équité inhérente aux joints-ventures, parce que pas assez explicites.*⁸⁰

(UR Annex 71, paras. 10-11, 20.)

342. The DRC has also criticised the UN Panels for failing to gather the relevant facts and for misunderstanding the concept of illegal exploitation. Thus, during the Security Council debate on the Second UN Panel Report, Hon. She Okitundu, Minister for Foreign Affairs and International Cooperation of the DRC, stated:

In calling into question the countries members of the Southern African Development Community (SADC) that came to help one of their own cope with

⁸⁰ Annex to Letter dated 5 December 2001 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the Security Council (S/2001/1156):

10. The Panel's report mentions the responsibility of the Government of the Democratic Republic of the Congo essentially in relation to contracts signed in the context of the exploitation of Kasai diamonds, of Katanga's cobalt and copper, with the economic operators from allied countries.

11. In this regard, the United Nations' Panel of Experts aimed at the following companies: COMIEX, COSLEG, BCD, SENGAMINES, SONANGOL, SOCEBO, and other different partnership conventions between the DRC and its allies, structures qualified as supporting the looting.

.....

20. The Government is aware of some partnership agreements between the DRC and its allies that contain controversial clauses but imputable to the context of war in which their signatures intervened. Indeed, it did not either wait for the UN Panel's visit to launch an evacuation action of the contractual dispositions, which, by the way, did not comply with the laws managing commercial companies and to the equity inherent to the insufficiently explicit joint ventures.

(UR Annex 71, paras. 10-11, 20.)

armed aggression, it seems to me that the addendum [Second Report] *inaccurately reflects the relevant facts and also seems to depart from the definition of illegal exploitation* as set forth in paragraph 15 [of Second Panel Report.]

(UR Annex 73, p. 7; emphasis added.)

343. Most recently, representatives of Government of the DRC made clear that the Third UN Panel Report could not be accepted without verification and without giving those who had been accused an opportunity to defend themselves:

Luhonge Kibinda Ngoyi, the DRC public prosecutor, told IRIN...that he would not automatically accept the UN report as correct, and want to make his own inquiries to ensure that justice was served. “This inquiry is aimed at enabling us *to verify if what the report said is true,*” he added.

The DRC Government spokesman, Kikaya Bin Karubi, said it was *necessary to give people cited in the report the opportunity to defend themselves.*

(UR Annex 94; emphasis added.)

344. The DRC cannot pick and choose: she cannot rely on those parts of the UN Panel Reports that favor her while discrediting the other parts. The same careless methodology -- which the DRC emphasises in her criticisms -- is used throughout the various Reports. The whole of the DRC’s case in Chapter IV effectively hinges on the First UN Panel Report. Given the official statements by the DRC that the Report is in fact not credible, the DRC’s entire case crumbles.⁸¹

⁸¹ See the *Nicaragua* case (I.C.J. Reports 1984, p. 41, para. 64) (“statements of this kind, emanating from high-ranking official political figures...are of particular probative value when they acknowledge facts...unfavourable to

(2) *The inadequacy of the First UN Panel Report was admitted in a subsequent UN Panel Report*

345. The DRC was not the only entity that acknowledged the inadequacy of the First UN Panel Report. The second UN Panel, which was charged with the responsibility of attempting to address some of the flaws of the First UN Panel Report, admitted that the First Report was defective.

346. Thus, the Second UN Panel Report recognised the inadequacies of the First Report. Moreover, it acknowledged that it had not corrected the inadequacies which negated the usefulness of the First Report:

The [second] Panel tried its best to address the complaints and reactions as a consequence of the [first] report and succeeding in meeting most of the parties. However, owing to severe time constraints, *it was not possible to address this issue in its totality.*

(DRCR Annex 70, para. 9; emphasis added.)

347. Thus both the DRC and the second UN Panel of Experts have admitted that the First UN Panel Report -- the foundation of the DRC's case against Uganda -- cannot be relied upon. Those admissions alone are fatal to the DRC's case, but it is appropriate to point out that the DRC and the UN Panel of Experts are not alone in their criticisms of the various UN Panel Reports. As Uganda demonstrates below, many other nations have similarly criticised the UN Panel Reports.

the State represented by the person who made them. They may then be construed as a form of admission.”).

(3) *A host of nations have criticised the UN Panel Reports*

348. In addition to the DRC, a host of other nations have criticised the various UN Panel Reports, pointing out the failure of the Panels to distinguish between fact and hearsay, to support allegations with evidence, to seek corroborative evidence, to interview relevant witnesses, to inspect relevant documents, to identify sources, to understand the context of events, to distinguish between legal and illegal activity, to provide an opportunity to those accused to explain or otherwise respond to allegations, and, in general, to satisfy basic standards of impartiality and evidentiary sufficiency. Such criticisms have come from a broad spectrum of nations.

(a) The First UN Panel Report

349. The Permanent Representative of China to the United Nations, for example, complained that the First UN Panel Report made it impossible to distinguish between reliable evidence and hearsay:

In some of the information provided in the Report, there is no clear distinction between cases with conclusive evidence and those with evidence that is either inadequate or merely hearsay. We hope that, in the next phase of its work, the Panel of Experts will apply stricter standards. It should, in particular, focus its work on the looting and illegal exploitation of the resources of the DRC, address the principal questions of significance and base its conclusion on hard evidence.

(UR Annex 53 (PM Resumption), p. 2.)

350. Similarly, the Permanent Representative of Norway pointed out the failure of the First UN Panel Report to distinguish between hard evidence and mere allegations, and the failure to provide any corroborative evidence:

Several members of the Security Council have asked the Chairperson of the Panel of Experts to provide the Council with a more assertive presentation of the findings, separating hard facts from more loosely based information. It is very difficult for the members of the Council to distinguish between information and accusations that are based on primary data that can link the accused parties to illegal exploitation with some certainty, and parts of the report that are based on information obtained in interviews. If possible, the next presentation should contain corroborative evidence against those involved.

(Ibid., p. 5.)

351. The Permanent Representative of Bangladesh also made clear that the First UN Panel Report did not meet minimum evidentiary standards, and added that the Panel itself failed to satisfy requisite standards of impartiality:

There are questions about the methodology used, about the quality of the evidence and about the nature of the conclusions....The Panel will do well if it can substantiate its conclusions against disclaimers offered.

The findings and conclusions of such expert panels have serious implications for the objectives pursued by the Security Council. We stress that reports of panels of experts issued in the name of the United Nations should meet evidentiary standards and other relevant norms. A Panel should, at the same time, be able to investigate and to submit its findings with absolute independence and objectivity.

(Ibid., p. 6.)

352. The Permanent Representative of Tanzania also complained about the undisclosed third-party “sources” on which the First UN Panel Report was fabricated, and noted that most of the allegations were made without supporting evidence or even a minimally satisfactory investigation of allegations:

My Government would like to have details so that it can investigate them.

My Government is willing and ready to play a very constructive role in our efforts to end the war in the Congo. But we can do so only in the context of irrefutable facts or a transparent process. We are too conscious that this has not been an easy task for the Panel of Experts. However, under the prevailing circumstances, it is difficult for us to respond in a constructive and meaningful way to the allegations....

For my Government, the door for dialogue with the Panel and this Council remains open. Regrettably, notwithstanding the findings [of the Panel], apparently obtained through third-party sources, ‘overwhelmingly’ suggesting the use of entities in Tanzania as a transit point for the inappropriate marketing of the natural resources of the DRC, the Panel chose not to visit Dar es Salaam, as evidenced in annex II of the report. Consequently, no Government official, nor any known Tanzanian, was interviewed. This neglect may have unwittingly undermined the relevance of those parts of the report to which we are addressing ourselves. This significant flaw requires a remedy.

(Ibid., p. 19.)

353. Rwanda also complained about the failure of the UN Panel to conduct a fair investigation of allegations, including specifically the failure to provide an opportunity for those accused to respond to allegations made against them:

[T]he private sector, which was characterized as pivotal in the illegal exploitation, was never contacted to clarify their business practices or credentials to the Panel. That is against the norms of natural justice.

(Ibid., p. 11.)

354. Finally, in its official Response to the First UN Panel Report, the Government of Rwanda also noted that the Report began with pre-ordained conclusions which the Panel seemingly set out to support:

This is the type of report the reader should read backwards. One should start with the wild recommendations in order to follow the absurdity of the report's contents. It is quite clear that the recommendations of the "experts" were pre-set wishes on which they based their methodological framework.

It is indeed not surprising that their first [interim] attempt at producing a report was found inadequate that they had to be made to review it. Unfortunately, the second attempt [the First Report] is still very unprofessional and full of hearsay and innuendos.

(UR Annex 52, p. 1.)

(b) The Second UN Panel Report

355. The fundamental deficiencies of the First UN Panel Report were not corrected in the later Reports, as a variety of nations have continued to recognise.

356. For example, Tanzania's requests for supporting evidence and for a thorough investigation by the UN Panel were, unfortunately, not honoured. The Second UN Panel Report simply ignored Tanzania's criticisms, and repeated as if by rote the allegations contained in the First Report. This prompted Tanzania to reiterate the failure of *both* UN Panels to provide support for their accusations:

We are therefore dismayed that the Panel is repeating the same accusation contained in the report in document S/2001/357 of 12 April 2001 [the First Report] to the Council without making available any evidence which would have helped the Government of the United Republic of Tanzania to conduct further investigations....

As regards timber exports, available records show that the Tanzanian Harbour Authority did not handle timber for export during the period under review.... The Panel claims that it has obtained documents indicating that at least two shipments of timber originating in the DRC were transported through the United Republic of Tanzania. We are surprised, however, that the Panel did not share this so-called evidence with the Government of the United Republic of Tanzania....

It is also our expectation and our sincere hope that the Panel will make available to my Government the so-called credible evidence it claims to have obtained on the matters raised in the report. The cooperation of the Panel in that regard would be in the interest of furthering the peace process in the DRC in particular and of ensuring peace and stability in the Great Lakes Region as a whole.

(UR Annex 73 (AM Meeting), pp. 15-16.)

357. The Government of South Africa made clear that the Second UN Panel, despite repeated requests, failed to provide supporting evidence (if any existed in the first place):

To further its own investigation, South Africa also requested additional information from the Panel in October 2001.

It is for this reason that my delegation is surprised at the claims by the Panel that there is 'credible' information implicating individuals or entities of using South African territory and facilities to conduct illicit commercial activities involving the Congo's natural resources. This information was not mentioned, nor did the Panel offer to share this evidence, during its meetings with the South African authorities.... In this regard, we would appreciate receiving from the Panel of Experts the names of individuals and/or businesses, as well as supporting evidence of their alleged activities - dates, places, routes, time frames and associates in South Africa and the DRC.

My delegation would therefore humbly advise the Panel to be more willing to exchange detailed information with Member States. Any perceived unwillingness by the Panel of Experts in this regard constitutes a serious impediment to its own mandate....

(*Ibid.* (PM Resumption), p. 2.)

358. The Government of Zambia similarly emphasised that it had not been provided any evidence supporting the allegations made against it in the First and Second UN Panel Reports:

We are therefore disturbed by these unjustifiable accusations. If the Panel, as

claimed in paragraph 111 [of the Second Report], has information that various Congolese resources transit through Zambia illegally, the noble and decent thing to do would be to inform my Government so that the necessary control measures can be effected.

My country therefore challenges the Panel to substantiate these allegations as they appear in the report. If it should fail to do so, we would demand a retraction and an apology.

(Ibid., pp. 11-12.)

359. Rwanda also stated that the Second UN Panel Report, like the First, failed to support its broad allegations with substantive evidence:

On the allegations concerning the exploitation of the wealth of the DRC, the Government of Rwanda has noted that, in the present addendum (S/2001/1072) to its report [Second UN Panel Report], as before, the Panel, in the case of Rwanda and its Government, did not indicate the names of organizations involved in the exploitation of resources. But we do not have all the details of its investigations....

Secondly, the Panel did not fully establish links between the exploitation of resources and the operations of the Rwandan Patriotic Army. Once again, if there is evidence, we did not see it in the report of the Panel....

(Ibid. (AM Meeting), p. 17.)

(c) The Third UN Panel Report

360. During the Security Council's open debate on the Third (and supposedly Final) UN Panel Report, members of the Council made clear that they did not consider the allegations contained in any of the three Reports to have been sufficiently proven to warrant any action by the Security Council. Many Council members also expressed the view that the countries, companies and individuals named in the Reports should have been afforded the opportunity to respond to the accusations made against them.

361. Mauritius, for example, criticised the failure of the Panel to verify its allegations and to interview all relevant parties before making accusations:

It is important that all information be fully verified and that countries named in the reports have the opportunity to provide explanations. We note, for example, that paragraph 18 of the [Third UN] report makes reference to a joint Zimbabwe-Democratic Republic of the Congo company to be set up in Mauritius to disguise the continuing economic interests of the Zimbabwe Defence Forces in the Democratic Republic of the Congo. Unfortunately, no counter-checking or verification of that information was ever requested from Mauritius. Such shortcomings lead to the undesired conclusion that the report aims at sensationalism.

(UR Annex 106 (PM Resumption), p. 2.)

362. The Government of Singapore similarly criticised the failure of the UN Panel to afford due process by providing the governments, individuals and companies accused in the Third Report with an opportunity to respond to those accusations:

However, as the Security Council deliberates on this substantial report, we will also need to take into account the responses of the Governments, individuals and companies implicated in the report. It is no understatement to say that the report has stirred up a hornet's nest. As we have heard today, many of the parties implicated in the report have accused the Panel of failing to observe due process and of relying on flimsy evidence in arriving at its findings. The chairman of one such company, Oryx Natural Resources, visited Security Council members in New York last week, including our delegation, to make the case that his company was innocent. He also told us that the Panel made no attempt to contact him or his company to check its facts prior to implicating his company in the report.

In our view, such responses to the report must be fully addressed so that no innocent party is inadvertently included among the guilty but the guilty parties are conclusively shown to be what they are. To achieve this, we must ensure that due process is observed.

(Ibid., p. 4.)

363. The Government of the Syrian Arab Republic rejected the Third Report as inaccurate, emphasising that the UN Panel, rather than securing documentary and other evidence, had relied on informers (who may well have been competitors of those accused) and had provided no opportunity for those accused to refute the allegations made against them:

Having considered the report of the Panel of Experts, we are a bit surprised by some of its contents and by its failure to secure irrefutable evidence before leveling blame and accusations against individuals and

companies; indeed, this has been done even without prior contact with those individuals or with representatives of those companies. In addition, we reject conclusions volunteered by members of the Panel when such conclusions were not required or when they were based on reasoning that is difficult to understand. Here, we would like to note the report's political reference to a number of companies in Africa and in the Arab region. As far as we know, the report was not supposed to deal with the internal affairs of other African countries or with political aspects related to Arab countries. Therefore, we would like to express our dissatisfaction at the leveling of accusations and description of some business people as members of international criminal organizations. Is that not somewhat exaggerated?

We also note that the report was based on information provided by informers, be they companies or competing traders. That affects the accuracy of the report and the credibility of the Panel of Experts.... We understand the importance of the Panel's work and the importance of providing it with all the assistance it needs to collect documents that would support its conclusions.

We have also endorsed the idea that the Panel should meet with those mentioned in the report. But we feel that the Panel failed to make such contacts or ask questions about the contents of a number of paragraphs relating to some major countries in the region.... Leveling accusations against Arab cities and countries such as Dubai and the United Arab Emirates in some paragraphs of the report was out of place

and unacceptable.... Our delegation believes that every accusation against Arab individuals named in the report can be answered and refuted.... We confirm that these individuals and company representatives possess the documents needed to refute all the accusations leveled against them....

We believe that there is an urgent need to re-evaluate the entire contents of the report.

(Ibid., pp. 5-6.)

364. The Government of the United Kingdom, in like manner, emphasised that the Panel's failure to share information made it impossible for governments who were accused of wrongdoing to investigate and address the allegations:

My Government hopes that the Panel's Chair will nominate a spokesperson to respond to questions from organizations and individuals named in the report and its annexes. We would encourage the Panel to share information with Governments and companies named, to the extent possible without compromising source protection, so as to allow them to carry out full investigations and take necessary action.

(Ibid., p. 11.)

365. The President of the Security Council, speaking as the representative of China, summarised the Council's dissatisfaction with the Third UN Panel Report and, in particular, criticised the Panel's persistent inability or unwillingness to distinguish between illegal exploitation and legitimate trade:

As demonstrated in the statements made today, there are divergent views over the contents of the report, including the

recommendations contained therein. I wish to take this opportunity to point out that the report alleges that there are Chinese companies engaged in the illegal exploitation. We have carried out careful investigations but found nothing that would justify such allegations. We believe that, in discussing such questions, the Security Council should distinguish between illegal exploitation and day-to-day economic and trade exchanges, so as to avoid negative impact on the economic development of the Democratic Republic of the Congo and the livelihood of its people. Also, the views of that country and others concerned should be carefully listened to.

(Ibid., p. 19.)

366. Other members of the United Nations attended the Security Council deliberations at the invitation of the Council and, like members of the Council, came to the conclusion that the Third Report had failed to substantiate its accusations with anything approaching the requisite degree of proof.

367. The Government of Zimbabwe, a primary ally of the DRC, emphasised that the Third Report often repeated unfounded allegations contained in the earlier Reports without the appropriate effort at verification:

The final report repeats allegations that have been challenged and discounted in the past without offering any new evidence....

Either the Panel mistakenly believes that repeating these falsehoods will somehow transform them into accepted truths or it is pursuing a certain agenda whose realization demands that the falsehoods should continue to be peddled in the public domain.

(Ibid. (AM Meeting), p. 20.)

368. Zimbabwe had in fact raised the alarm about the credibility of the Third UN Panel Report even before the Report was officially released. In a letter dated 17 October 2002, Zimbabwe complained about the reliance of the UN Panel on unsupported allegations:

In the meantime, it has come to the attention of the Government of Zimbabwe that the international conspiracy and alignment of forces against Zimbabwe continues unabated, as exemplified by the grotesque fabrication of false evidence being presented to the Panel by our detractors through the Western media.

.....

Mr. President, the grotesque and malicious interference by enemies of my country in what should be a professional investigation by the Panel continues to this date....

(UR Annex 92, pp. 1-2.)

369. During the Security Council debate on the Third Report, South Africa likewise reiterated the failure of that Report to substantiate its allegations, and the failure of the Panel to provide an opportunity for parties to respond to the allegations against them:

However, we would like to inform the Security Council that South Africa is disappointed with the content of the final report presented to the Council by Ambassador Mahmoud Kassem. We are disappointed in the methodology the Panel used in gathering its information and in the conclusions and recommendations the Panel sets out in its report. South Africa would urge that the Security Council require the Panel to further investigate and substantiate the allegations and recommendations made

in the report. We believe that the Panel's report contradicts the aims and the intentions of the Security Council.

.....

It is therefore not acceptable that an expert panel, given the opportunity to meet with Government authorities, withholds information on matters that are of concern to the Governments involved. Yet Governments are supposed to further investigate allegations of interest to panels without being given basic information.

(UR Annex 106 (AM Meeting), p. 9.)

370. South Africa also put her criticisms in writing. In a letter to the President of the Security Council, South Africa noted the failures of those preparing the Third UN Panel Report objectively to evaluate information and to cooperate with the investigations being conducted by relevant governmental authorities:

South Africa is disappointed with the content of the final [Third] report[,] the methodology the Panel used in gathering its information and the conclusions and recommendations the Panel makes in its report.... The Panel's report contradicts the aims and intentions of the Security Council.

We are particularly disappointed because the South African Government welcomed the Panel when it visited our country and arranged for the Panel to meet with various senior officials from departments and agencies that were ready to assist the Panel in its work. The Council will notice that the examples cited later in my letter are contrary to the Panel's claim of having "made every effort to fairly and objectively evaluate the

information it has gathered". A difficulty that we experienced was the quality and extent of the information that the Panel made available to the South African authorities. The information upon which South African authorities were expected to conduct the necessary follow-up investigations was either incomplete or never given.

(UR Annex 96, p. 1.)

371. After discussing specific instances where allegations in the Third UN Panel Report were not supported by evidence, South Africa commented on the fundamental defects of the Report: the absence of hard evidence, the failure properly to distinguish between legal and illegal activities, and the failure of the Panel to share information with South Africa:

The report's statements about South Africa, South African companies and South African individuals consequently do not appear to be substantiated by hard evidence or information. Nor does the Panel draw any distinction between legal and illegal activities of companies in its report. In their interaction with the Panel, the South African authorities underlined the difficulties that are experienced when dealing with the vagueness of certain queries received. It was pointed out that the provision of more detailed and accurate information would assist the South African authorities to address the issues raised.

.....

The Council will understand that South Africa regards this in a serious light, not only because of its imputations, but also because of the role that South Africa

continues to play, both in its national capacity and as the Chair of the African Union, in achieving lasting peace, security, stability and prosperity for the Democratic Republic of the Congo and its people.

(Ibid., p. 4.)

372. During the Security Council debate, the Government of Oman emphasised the damage done by the unverified and unfounded accusations contained in the Third UN Panel:

As I turn to the report of the Panel, I will restrict my comments to those paragraphs pertaining to one company and its chairman. I cannot but express my delegation's strong concerns at the wrongful allegations, factual errors, hearsay and uncorroborated information propagated against Oryx Natural Resources, the most negative of which is that it is a front for the Zimbabwe Defence Forces.

.....

My delegation wishes to make the following observations. First, having studied the report of the Panel of Experts and its related documents, we could not find any proof to substantiate the allegations made against Oryx Natural Resources (ONR) and its chairman. Secondly, ONR, funded by private Gulf investors, and in joint venture with the Government of the Republic of the Congo, aims at contributing towards the economic and social development of that country.

.....

...[W]e fail to find any credible reason why this matter is before the Council in the first

place. My delegation calls on the Council to protect and uphold the reputations of the companies and individuals mentioned in Annexes I and II of the report and to close forthwith this file so as not to undermine the legitimate achievements through these false accusations. It is my delegation's hope that the council will seriously take into consideration the grave concerns expressed by delegations that have spoken before me and that the Council will take appropriate action to rectify the damaging and incorrect information contained in the report.

(UR Annex 106 (AM Meeting), pp. 18-19.)

373. Rwanda also noted that the Third Report simply repeated earlier unsupported accusations:

The final report adds almost nothing new to earlier reports; it merely repeats unsubstantiated allegations that we refuted on 3 May 2001, after the first report was issued. The report is politically motivated.

(*Ibid.*, p. 17; see also UR Annex 93, describing the Third Report as “poorly researched” and “grossly unprofessional.”)

374. The Deputy Foreign Minister of Belgium, recently commenting on the Third Report, noted that many companies were listed as “non-ethical” without any explanation in the text of the report. Echoing the comments of many other States about the UN Panel Reports, the Deputy Foreign Minister noted that the Third Report “failed to propose ways of distinguishing the legal from the illegal.” (UR Annex 100.)

375. In fact, the DRC's Minister of National Security, Hon. Mwenze Kongolo, recently wrote to the Secretary-General to criticise the fact that the Panel had neither spoken with him nor provided him with copies of documents prior to making accusations linking him to illegal activity. (UR Annex 105, p.

2.) Hon. Kongolo noted that the practice of making unsubstantiated allegations had a devastating effect:

I reserve the right to use all means made available under the law so that my dignity, reputation and my honour, which have been severely tarnished by this report, be restored.

(*Ibid.*)

(4) *The UN Panel Reports do not meet the UN's own standards*

376. Each of the UN Panel Reports at issue in this case failed to meet the standards which other UN panels have adopted in considering similarly serious allegations against States. For example, in *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA (S/2000/203)* 10 March 2000 ("*UNITA Report*"), the UN panel with responsibility for that investigation emphasised that it had conducted a broad range of interviews and specifically identified its most important sources:

In all, Panel members visited nearly 30 countries, meeting with Government officials, members of the diplomatic community, non-governmental organizations, police and intelligence sources, industry associations and commercial companies, journalists and others.... [V]ideotaped interviews were conducted with a number of key recent defectors from UNITA, including General Jacinto Bandual, Col. Alcides Lucas Kangunga (known as "Kallias"), Lt. Col. Jose Antonio Gil, Col. Aristides Kangunga (brother to Kallias), and Mr. Araujo Sakaita. The team also had an opportunity to travel to Andulo, where they examined stocks of equipment captured during and after the battle for Andulo, and spoke with a

number of soldiers who had defected from UNITA following the battle.

(*UNITA Report*, para. 8.)

377. The *UNITA* panel, moreover, secured documentary evidence and required corroboration of all allegations. In fact, where political leaders were mentioned, the panel required both *direct* evidence and *two* forms of corroboration:

11. Evidentiary standards. The team that visited Luanda in January received a large amount of detailed and valuable information, including documents. With the details provided by defectors and others, the Panel was able to confirm and corroborate information that Panel members had independently uncovered or received from other sources. In all of its work, the Panel has been especially careful *to use only information that has been confirmed or corroborated by more than one source in which the Panel has confidence. This standard has been applied to all information collected by the Panel, including information gathered from UNITA defectors.*

12. ...In the case of those political leaders that are mentioned, *the Panel has required direct evidence, that is confirmed and corroborated by at least two other sources deemed by the Panel to be credible. In view of the implications of the report, the Panel feels that any lesser standard would not be appropriate.* For other non-UNITA persons mentioned in the report, the Panel has required a comparable level of proof for their involvement, and tried to focus primarily on the main actors in each category....

(*Ibid.*, paras. 11-12; emphasis added.)

378. Likewise, in *Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone (S/2000/1195)* 12 December 2000 (“Sierra Leone Report”), the panel met not only with informants but also with governmental authorities and private sector firms, and thereafter listed sources on which it relied:

In each country Panel members met with Government authorities, and where relevant, with diplomatic missions, civil society organizations, aid agencies, private sector firms and journalists. The Panel had access to a wide range of public and confidential information provided by official sources, including law enforcement and intelligence agencies. The Panel also contacted a number of key individuals and informants whose names have been a subject of interest and controversy in recent months in connection with the Sierra Leone crisis. A full list of those contacted is contained in annex 2.

(*Sierra Leone Report*, para. 61.)

379. The *Sierra Leone* panel, like the *UNITA* panel, required corroboration of allegations (in the case of *Sierra Leone*, by *two* independent sources). The *Sierra Leone* panel also verified allegations by examining documentary evidence and by contacting established law-enforcement agencies. Last but not least, the panel provided an opportunity for those against whom allegations were made to respond before the report was issued:

The Panel agreed at the outset of its work to use high evidentiary standards in its investigations. This required *at least two credible and independent sources of information* to substantiate a finding. Wherever possible, *the Panel also agreed to*

put allegations to those concerned in order to allow them the right of reply.... The Panel examined ... flight records.... It saw photographs of the aircraft being loaded.... It examined flight plans. It spoke to eyewitnesses of aircraft movement...and it spoke to individuals who were on board the aircraft in question. In addition to its own detailed verification, the Panel received corroborating information from international intelligence agencies and police sources operating at international as well as national levels. The assistance of Interpol specialists was also taken as and when required.... All issues have been judged and reported using the same standard.

(Ibid., para. 63; emphasis added.)

C. **The Inherent Defects Of The United Nations Panel Reports Undermine The Allegations Against Uganda**

(1) The allegations against Uganda are not supported by credible evidence

380. As so many other States have noted, the First UN Panel Report amounts to nothing more than a litany of allegations, rather than being a careful compendium of substantiated and corroborated evidence. The Second and the Third UN Panel Reports continue to rely heavily on the discredited First Report. All three Reports are riddled with accusations based only on “information” that is not specified and “sources” that are not named. All three Reports, moreover, fail to disclose how any sources or information were tested for veracity and credibility, if at all; how any Panel established that the sources or information were reliable; and how that reliability was tested. There is no suggestion that allegations in any Report were corroborated by independent information, and all three Reports are woefully lacking in specifics capable of verification. For example, the Third UN Panel Report theorises about “elite

networks” of exploitation at a very general level but does not demonstrate any credible evidentiary support or indicate exactly how those purported “networks” would implicate Uganda as a State, and persistently fails to sift out falsehoods and war propaganda or to corroborate allegations with substantiated evidence. (UR Annex 103, paras. 10-12.)

381. Although the overriding objective for extending the mandate of the Panel after issuance of the first two Reports was to formulate “a response, based as far as possible on corroborated evidence, to the comments and reactions of the States and actors cited in the report to the Panel” (UR Annex 54), the Third Report, like the earlier Reports, continued the woeful practice of repeating unsubstantiated allegations. In response to the Third Report, Uganda supplied evidence of specific factual errors and, like so many other States, noted that “the United Nations Panel continues to rely on hearsay/uncorroborated information. Indeed, the final report of the Panel contains a number of serious factual errors.” (UR Annex 95, para. 2(c).)

382. As this Court observed in the *Corfu Channel* case (Merits), and reaffirmed in the *Nicaragua* case,

The statements attributed by the witness ... to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence.

(I.C.J. Reports, 1949, pp. 16-17; I.C.J. Reports, 1984, p. 42, para. 68.)

383. In the *Corfu Channel* case, there was at least a witness, although that witness was recounting hearsay. In this case, the *Reply* and its sources (including, most notably, the First UN Panel Report) do not even purport to provide statements by witnesses, resting instead only on unnamed “sources” and “information.”

(2) *The UN Panels have refused to provide supporting evidence to Uganda*

384. Like others accused by the UN Panels, the Government of Uganda has been denied the information on which the accusations against it were supposedly based, frustrating efforts to investigate, verify and punish wrongdoing, if any, which might exist:

The Addendum to the report [*i.e.*, the Second Report] accuses senior military officers of continuing to have commercial networks in the DRC....

...It would, therefore, be very helpful for the Panel to provide evidence to Uganda's Porter Commission of Inquiry so that it can finalize investigations involving senior UPDF officers. The Uganda Government is committed to the implementation of the recommendations of the Porter Commission of Inquiry.

(UR Annex 70, p. 3.)

385. Determined to establish the truth regarding allegations made in the UN Panel Reports, on 23 May 2001, the Government of Uganda appointed the Porter Commission, an independent judicial commission of inquiry whose task was to hear, collect, and verify evidence. The Porter Commission consists of Hon. Justice David Porter as the Chairman and two other members. It has the judicial powers of the High Court (the highest court of original jurisdiction in Uganda) including the powers to summon witnesses and to compel the production of documents through the issuance of subpoenas.⁸² (UR Annex 96, para. 2 (c)(iii).) As Uganda will demonstrate below, sworn and documentary evidence was produced before the Porter

⁸² The legal instrument establishing the Porter Commission was circulated to the Security Council via a Letter dated 25 May 2001 from the Chargé d'affaires a.i. of the Permanent Mission of Uganda to the United Nations addressed to the President of the Security Council (S/2001/522).

Commission which contracted most of the allegations made in the UN Panel Reports. In addition, the UN Panels declined to provide the requisite information on which they relied for verification of the allegations in the Panel Reports.

386. The UN Panels failed to provide information on which they based their claims to the Porter Commission. That failure led Mr. Justice Porter to express his frustration regarding the Panel's repeated reliance on so-called "reliable" and "very reliable" sources which remained unidentified:

[O]ne of the problems this Commission has is that; in the panel report, there were all sorts of sources, reliable sources and very reliable sources that were meant to settle these things, but we have actually no idea who these sources are and whether they are able to talk to us and whether we have any chance to call them before us. This is extremely difficult and I just wanted to put that on record because it is very hard for us to be able to say that with the exception of one or two names that specific people were supposed to have done specific things at specific times, it is very difficult. And as you know a Commission like this can only rely on sworn evidence. It may hear of all sorts of things. But unless somebody is prepared to come here and give evidence we in our report cannot I think take any notice of that....

(UR Annex 64, Part C, p. 3.)

(3) *The UN Panels failed to interview key witnesses and to review critical documents*

387. As the criticisms of a multitude of States demonstrate (*supra*, para. 339-79), Uganda was hardly alone in raising concerns about the methodology of the UN Panels, especially

regarding the quality of evidence collected and used in reaching conclusions. The first UN Panel, for example, failed to interview key Ugandan officials despite their willingness to meet, such as Hon. Amama Mbabazi, Uganda's Minister for Foreign Affairs during the period under investigation as well as the Co-Chair of the Joint Ministerial Political Committee under the Lusaka Agreement, Gen. Kazini, who headed UPDF operations in eastern Congo until 2000, and Maj. Gen. Wamala, who took over from Gen. Kazini as the head of UPDF operations. (UR Annex 65, Part C, pp. 30-31; UR Annex 60, Part C, pp. 5-6; UR Annex 63, p. 35.)

388. The Panels also failed to interview key witnesses from the private sector who were condemned unheard. As the Porter Commission noted, patent errors could easily have been avoided by interviewing the private individuals concerned or by reviewing public sources such as documents from company registries:

The Commission is extremely concerned at the approach of the Panel to this subject [the DARA-Forest Case, *see infra*, paras. 390-99]. Nowhere in the whole of this passage [DRCR Annex 69, para. 54] is the reliability of sources quoted, but, considering the emphasis put on these alleged events, the Panel must have come to the conclusion that it was safe to rely on its undisclosed and apparently un-evaluated sources. Yet the perception of those sources, and that of the Panel, was quite clearly wrong. A short interview with Mr. Kotiram would have established the truth, and he was never approached according to his evidence.

From the evidence, this Commission has come to the conclusion that the investigation by the Panel of DARA-Forest was fundamentally flawed.

(UR Annex 68, pp. 38-39.)

389. There are many other examples of the failure of the UN Panels to interview or meet with private individuals or representatives of companies before making serious allegations against them. The private individuals and companies that the UN Panels accused of serious wrongdoing but failed to interview include the Oryx Company (UR Annex 106, pp. 18-19) and Mr. George Forrest and the Forrest Group of Companies. (UR Annex 105, p. 2.) As Mr. Forrest noted, the UN Panels were negligent in their failure to secure responses from those against whom allegations were made, if not intentionally malicious in refusing to meet with individuals and companies who sought an opportunity to rebut allegations and protect their reputations:

The Group of experts has undoubtedly wished to hit hard, but by refusing to meet with the Forrest Group and to listen to them, the experts have intentionally committed very serious negligences, causing at an international level the devastation of the commercial reputation of the Forrest Group and endangering its economical survival, for which, without any possible discussion, the responsibility lies on the group of experts.

(Ibid.)

(4) *The DARA-Forest "Case Study" exemplifies the lack of credibility of the First UN Panel Report*

390. The DARA-Forest case typifies the unreliability of the First UN Panel Report -- the single document on which almost all of the DRC's allegations of exploitation are grounded. The UN Panel went so far as to make a "case study" out of DARA-Forest, using it to illustrate the Panel's views that "illegal" exploitation had become systematic and deeply ingrained in states like Uganda. DARA-Forest, however, is in reality a "case study" of the methodological failures of the UN Panel Reports.

391. In discussing DARA-Forest, the First UN Panel Report made detailed accusations of illegality and of Uganda's collusion in that illegality, assuredly treating those allegations as though they were established fact, just as all three UN Panel Reports treat other allegations against Uganda as fact without supporting or corroborating evidence:

Besides extracting timber without authorization in a sovereign country and in violation of the local legislation, DARA-Forest consistently exported its timber without any certification procedure. It tried to approach some certification bodies licensed by the Forest Stewardship Council. These bodies requested documentation and elements that the company failed to provide. Yet DARA-Forest exported timber in violation of a normal procedure generally required and accepted by the international forest community and generally considered to be international "soft law."

(DRCR Annex 69, para. 50; *see generally ibid.*, paras. 47-54.)

392. Because Japan was implicated by the First UN Panel Report as an importer of uncertified timber from DARA-Forest, the Permanent Representative of Japan to the Security Council called for evidence supporting those allegations:

Before concluding, I would like to offer my comments on the reference made in the report to the companies located in various countries, including Japan, which the report claims are importing uncertified timber from a Ugandan-Thai forest company called the DARA-Forest, located in the Ituri area of the DRC. The Japanese authorities are investigating the matter and would appreciate any concrete evidence that the Panel of Experts might have to substantiate the statement made in the report and that

would assist our Government in its investigation.

(UR Annex 53 (PM Resumption), p. 12.)

393. The Second UN Panel deigned to take a “closer look” at DARA-Forest and was forced to acknowledge that DARA-Forest is actually registered not only by the rebels controlling the areas in which it operates but also by the Government of the DRC. Without offering any apologies, the Second UN Panel Report not only conceded this point, but also made it clear that, contrary to the First UN Panel Report, DARA-Forest complied with all existing regulations, including those set out by the DRC Government:

DARA-Forest is a Congolese-registered logging company owned by five shareholders. Royal Star Holdings is the main shareholder, and is partly owned by the managing director of DARA-Forest, John Kotiram. Besides Mr. Kotiram, there are three Congolese shareholders. In March 1998, DARA-Forest was granted a 35,000-hectare logging concession from the North Kivu Provincial Authority, which grants these concessions *following registration with the central Government*. DARA-Forest also acquired an exploitation license from the same authority to buy and export from local loggers....

The company, which *the Panel has found to have complied with all the regulations in effect*, currently pays its taxes at the same bank as it did before the area came under rebel control.... The Panel also learned that a bimonthly check is conducted by the local Congolese authorities in North Kivu to ensure that DARA-Forest is complying with the terms of licences granted to it. Furthermore, DARA-Forest was granted on

12 September 2001 a certificate of registration *from the Ministry of Justice in Kinshasa*. This would appear to be a clear sign of recognition of the company and *acceptance of its work in the rebel-held areas by the Government of the Democratic Republic of Congo*.

(DRCR Annex 70, paras. 72-73; emphasis added.)

394. The First UN Panel Report made further allegations of collusion between DARA-Forest and the Ugandan Ministry of Water, Land and Forests which also turned out to be false. That Report claimed that DARA Great Lakes Industries (DGLI), a subsidiary of DARA-Forest, colluded with the Ministry to defraud the DRC by having timber certified by the Rogue Institute for Ecology and Economy as “Smart Wood” coming from forests in Uganda, including the Budongo forest, despite the fact it was extracted from the DRC. According to the UN Panel, the collusion of the Ministry in this scheme was evidenced by the “fact” that when the DARA group applied to have a Rogue Institute official visit Budongo forest from 14 to 16 April 2000 to certify timber, “the DARA group had not even applied for the concession of the Budongo forest (Uganda). It was only on 5 July 2000 that...the DARA group wrote to the Commissioner to request the concession on the Budongo forest.” (DRCR Annex 69, para. 51.)

395. The truth, however, is revealed by correspondence which the Panel ignored or misrepresented:

- (i) On 11 October 1999, DGLI applied for concessions to harvest wood from Mabira, Bugoma, and Budongo forests (UR Annex 36);
- (ii) On 21 March 2000, DGLI wrote a further letter to the Commissioner aimed at strengthening DGLI’s application for concessions in the three forests of Mabira, Bugoma, and Budongo (UR Annex 38);

- (iii) On the same day (21 March 2000) (UR Annex 39), DGLI wrote a letter to the Commissioner requesting permission to have an official from the Rogue Institute visit the Budongo and Bugoma forests;
- (iv) On 5 July 2000, DGLI sent another letter proffering further reasons for being awarded a concession to the Budongo forest. (UR Annex 41.) This is the letter that the UN Panel referred to as “evidencing” collusion. (DRCR Annex 69, para. 51.) In making this claim, however, the UN Panel completely ignored the previous correspondence between DGLI and the Commissioner.

396. Documentary evidence thus demonstrates that DGLI applied for a concession in October 1999, well *before* the planned Rogue Institute certification visit. DGLI demonstrably did *not* obtain certification without applying for a concession for the forest on which the certification was based.

397. Further negating claims of collusion, DGLI’s provisional licences to extract timber were not summarily granted, but rather were awarded only after the normal, thorough Government process, on 18 September 2000. (UR Annex 42.) Moreover, those provisional licences did not permit the company to extract timber, but only to prepare a work and investment plan and environmental impact assessment and to put in place the necessary infrastructure for implementing the work plan. (UR Annex 43, para. 3.) The First UN Panel Report thus simply misstated the facts in order to concoct evidence of “collusion.”

398. Further negating the claims of collusion, the Ministry on 18 September 2000 also *denied* a request by DGLI for a permanent permit to transit timber. (UR Annex 44.) The fact that the Ministry which was allegedly party to a conspiracy denied DGLI’s application is ample evidence that there was no such collusion, as the Porter Commission correctly concluded:

Then it can be shown that there was no collusion...because one application which was made to the Ministry, which, if the Panel is right, would have been essential to the alleged conspiracy, was refused by the Ministry....

.....

The Panel's informant no doubt did not have, as this Commission has, DGLI's application to the District Forestry Officers concerned for concessions in three Ugandan forests, namely Budongo, Bugoma and Mabira dated 11th October 1999, and therefore have seen conspiracies where no conspiracies exist.

(UR Annex 68, pp. 34-37.)

399. Thus, the First UN Panel's archetypal "case study" of "illegal exploitation" turned out to involve a company which was operating legally and in compliance with all regulations. Nothing distinguishes the unnamed "sources" on which the First UN Panel Report relied in making accusations with respect to DARA-Forest from the unnamed "sources" on which all three UN Panel Reports relied in making their other allegations. All such "sources" are not credible.

(5) *Allegations about the "Victoria Group" and "Trinity Company" are contradicted by public information*

400. Relying again on the First UN Panel Report, the DRC places great emphasis on the supposed activities of two other companies, the so-called "Victoria Group" and the so-called "Trinity Company," which the DRC asserts "*mettent en cause certains officiers de l'UPDF, des hautes personnalités ougandaises et les chefs rebelles soutenus par l'Ouganda.*"⁸³

⁸³ "cast doubt on the integrity of certain UPDF officers, high-ranking Ugandan officials and the rebel chiefs supported by Uganda."

(DRCR, para. 4.19; *see generally* DRCR, paras. 4.19-4.20.) In fact, the DRC “casts doubt” only on the integrity of the sources on which she places such great reliance.

401. The First UN Panel Report claimed that the “Victoria Group” is headquartered in Kampala and is chaired by a Mr. Khalil and owned by Mr. & Mrs. Caleb Akandawanaho and Mr. Muhoozi Kainerugabe. The report then alleges that the Victoria Group is involved in illegal activities in eastern Congo. (DRCR Annex 69, para. 80.) Available documentary evidence, however, indisputably shows that there is no entity called the “Victoria Group,” as Uganda has previously made clear. (UR Annex 55, p. 21, para. 3.02(b)(v).) There is a different entity by the name Victoria Diamond, but, even assuming that is the company the DRC means, it is not an unlicensed entity owned by “high-ranking Ugandan officials.” As shown by publicly available documents, and contrary to the allegations of the UN Panel:

- (i) As established by the company’s articles of association, the company’s sole shareholders are one Ahmed Ibrahim, a Lebanese national who has been residing in Goma, DRC since 1972, and Kay Nduhuukire, a Ugandan national who has been residing in Goma since 1976 (UR Annex 32);
- (ii) The company has relevant licences to engage in the business of trading in diamonds in the DRC. (*Ibid.*)

402. The easy availability of these documents at the relevant public offices in Goma, as well as at the company’s headquarters in that same city, confirm that the UN Panel at best did not use reasonable efforts -- or, apparently, any efforts at all -- to establish the truth about the company before making patently false allegations against the company and persons in Uganda. At worst, the UN Panel discovered the information and suppressed it because it conflicted with the accusations it wished to make.

403. The DRC also adopts the allegations of the First UN Panel Report that “Trinity Company” is a company owned by Ugandan national Gen. Salim Saleh and his wife which has acted as cover for myriad illegal activities in the DRC. (DRCR, para. 4.19; DRC Annex 69, para. 81.) Documentary evidence, however, demonstrates that there is no “Trinity Company.” (See UR Annex 55, p. 21, para. 3.02(b)(v).) There is a company named Trinity (U) Limited, a perfectly legal company, incorporated in Uganda. If the Panel was trying to refer to that company, publicly available documents at the Registrar’s office in Kampala show that Trinity (U) Limited, contrary to the allegations of the UN Panel, is not owned by either Gen. Saleh or his wife. The four subscribers to all the shares of this company are listed in its Memorandum of Association as Messrs. Niyibigira Innocent of Post Office Box 2428, Kampala, Uganda; Kayita Deo of Post Office Box 10239, Kampala, Uganda; Hashaka James of Post Office Box 123, Kisoro, Uganda; and Serushago James of Post Office Box 8750, Kampala, Uganda. (UR Annex 34.)

404. Testifying before the Porter Commission, Gen. Saleh flatly denied allegations of looting of Congo resources and, in addition, provided his foreign accounts to the UN through the Commission and promised that his wife would also release hers to the UN Panel for investigation. (UR Annex 102; *see also* UR Annex 104.) Gen. Saleh also made clear that his assignment from President Museveni was to “bring about peace between Uganda and Congo.” (UR Annex 102.) That role, and the DRC’s recognition of it, was recently confirmed by the fact that President Museveni *and President Kabila of the DRC* jointly assigned Gen. Saleh the duty of repatriating the Congolese rebels and government soldiers living in Uganda. (UR Annex 104.)

405. Thus, as with the so-called “Victoria Group,” patently false allegations were made about the “Trinity company” by the UN Panel, and adopted by the DRC, despite the existence of readily available documentation to the contrary. It is particularly significant that the UN Panel (DRCR Annex 69, paras. 80-81), and the DRC (DRCR, para. 4.19), asserted repeatedly that the allegations about the Victoria Group and the

Trinity Company were based on “reliable sources.” The fact that information was readily available to contradict the allegations, but that no apparent effort was made to confirm, discuss or even investigate those allegations, makes clear that the DRC’s standard of “reliability” is unacceptable for the purposes of this Court.

D. The Nature Of Uganda’s Intervention In The Congo Was Inconsistent With Exploitation, As The United Nations Has Implicitly Recognised

- (1) *The limited nature of Uganda’s intervention is inconsistent with exploitation*

406. Uganda has established in this *Rejoinder* (*supra*, Ch. III) that the presence of UPDF troops in eastern Congo was motivated solely by Uganda’s profound security concerns. These security concerns have been repeatedly acknowledged and validated by both the DRC and the international community in international legal and diplomatic instruments, including at least two bilateral agreements between Uganda and the DRC (*supra*, paras. 89-93, 105, 233-34), various diplomatic communiqués by officials of both Uganda and the DRC, a multilateral treaty (*see* UCM Annex 45), and various United Nation Security Council Statements and Resolutions. These instruments establish that Uganda has legitimate security concerns that caused her to send troops to eastern Congo, initially with the consent of the DRC, to shore up Uganda’s western border against incursions by various anti-Uganda insurgents based in the DRC. When the DRC purported to unilaterally withdraw the consent, Uganda exercised her right to self-defence under international law. (*Supra*, Ch. II.)

407. The limited nature of Uganda’s intervention is utterly inconsistent with the DRC’s theory that Uganda occupied the eastern Congo in order to exploit natural resources, and totally consistent with Uganda’s exercise of her right to self-defence. As discussed in more detail above, Uganda had, at the peak of the deployment, fewer than 10,000 troops in eastern Congo,

fewer troops than those of Rwanda, Zimbabwe (a DRC ally) and Angola (another DRC ally), and also far fewer than the number of rebel troops in the region. (*Supra*, paras. 170-71.) Uganda's troops, moreover, were concentrated at specific strategic locations, rather than spread across the region. (*Supra*, paras. 170, 173-74.) Eastern Congo is an area roughly the size of Germany, which clearly could not have been "occupied" or "controlled" with Uganda's contingent of fewer than 10,000 troops, particularly when other troops (including those of the DRC's allies) were deployed in the area. (*Supra*, para. 172.) Had Uganda in fact intended to exploit the DRC economically, she would have ensured that she had sufficient troops on the ground to control all areas in which natural resources, minerals, timber, coffee, and so on, were being produced and she would have deployed those troops across the region to control those loci of production. But Uganda's troops did not in fact fan out across the countryside as an occupying force. To the contrary, Uganda placed only a limited number of troops in limited locations which were of strategic military relevance, belying the DRC's arguments.

408. Uganda also did not engage in civil administration in eastern Congo. Under the Lusaka Agreement, which recognised the *de facto* situation on the ground, such administration was assigned to the RCD and MLC rebels who had the requisite competence to regulate and oversee the commercial and economic activities in the regions they controlled. (*Supra*, paras. 198, 201, 204-210.) Control by the rebel groups is also acknowledged by the Secretary General of the United Nations in his many reports to the Security Council on the situation in the DRC. In these reports, the Secretary General explicitly discusses the human rights situation in the DRC in terms of "government-held territory" and "rebel-held territory."⁸⁴

⁸⁴ See, e.g., The Reports of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, specifically The Tenth Report (DRCR Annex 35, paras. 80-84); The Ninth Report (DRCR Annex 34, paras. 45-50); The Eighth Report (DRCR Annex 33, paras. 64-70); The Seventh Report (DRCR Annex 32, para. 77); The Fifth

409. The nature of Uganda's intervention contradicts two positions taken by the DRC. First, Uganda was not in control of, or in occupation of, any portion of the territory of the DRC, so Uganda could not have exercised the pervasive economic control required to exploit the areas as alleged by the DRC. Had Uganda intended to exploit the resources of the DRC, Uganda would not have limited her presence as she did. Second, the rebels controlled and had administrative responsibility for areas of eastern Congo, so any contention that only the DRC Government could licence commercial activity in these regions is mistaken.

(2) *The UN and DRC positions are inconsistent with exploitation by Uganda*

410. The United Nations and the DRC have implicitly rejected the premise of the Panel Reports that the UPDF presence in eastern Congo was designed to facilitate illegal exploitation.

411. The Lusaka Agreement, first of all, contemplated the continued presence of Ugandan troops in the DRC, and then the importance of that presence was thereafter reaffirmed on 4 May 2001 by the Secretary-General of the United Nations. (*Supra*, paras. 104, 177, 213-23.) The continued presence of the UPDF was demanded by the critical contribution of Ugandan troops to the maintenance of peace in the DRC. Even now, with the withdrawal of Ugandan troops from eastern Congo, the Luanda Agreement and the United Nations recognise the need for the continued presence of the UPDF in Bunia. (*Supra*, paras. 105, 179, 229, 233-34; *infra*, paras. 600-04.) Recognition of the beneficial contributions of Ugandan troops and demands that they remain in eastern Congo are utterly inconsistent with allegations that the UPDF was engaged in widespread looting, exploitation and other abuses.

Report (UCM Annex 80, para. 65); and The Fourth Report (UCM Annex 74, para. 61).

(3) *The DRC's other sources support
Uganda's position*

412. The DRC also places reliance on the so-called *Resolution of the European Parliament on the illegal exploitation of the DRC's natural resources, 5 July 2001*. (DRCR, para. 4.06, 406 n.6.) Even were the "5 July 2001 Resolution" which the DRC has included as Annex 72 to her Reply to be taken at face value for the sake of argument, it would not support the DRC's claims against Uganda. First, that resolution does not even pretend to set forth any independent basis for its assertions, relying instead on other documents which are themselves unsubstantiated.⁸⁵ Second, that resolution does not assign any responsibility to the UPDF or to Uganda, or, indeed, even mention the UPDF or Uganda. Finally, the resolution asserts "that, first and foremost, it is the duty of the concerned parties to implement the Lusaka Agreement," which, as discussed above, contemplated the continued presence of the UPDF in eastern Congo. (*Supra*, paras. 104, 177, 213-223.)

413. Other documents that the DRC cites likewise do not find Uganda culpable, but do recognise the importance of compliance with the Lusaka Agreement. For example, the *Report of The All Party Parliamentary Group on the Great Lakes and Genocide Prevention* (DRCR Annex 75) does not even nominally mention Uganda as responsible for illegal exploitation of natural resources in the DRC. To the contrary, it clearly reaffirms the Lusaka Agreement, stating that it is "impossible to resolve conflict in one of these countries without looking at the causes and implications of conflict in others.... The demobilisation and resettlement of armed groups is critical to the success of the Lusaka Peace Process." (*Ibid.*, p. 3.)

⁸⁵ Other documents relied on by the DRC, such as DRCR Annex 77, are solely based on the First UN Panel Report, which, as has been demonstrated above, is utterly unreliable.

E. The First United Nations Panel Report, On Which The DRC's Case Rests, Inaccurately Construes The Context Of Uganda's Intervention In The Congo

(1) Ugandan forces did not fight in the so-called First Congo War in 1996-97

414. The first UN Panel started with the premise that UPDF troops had become familiar with the business potential of eastern Congo during the so-called First Congo War in 1996-97 while allegedly fighting alongside Laurent Kabila's forces in the anti-Mobutu insurrection. Having learned of the resources in eastern Congo, the Panel's argument goes, the UPDF was only too eager to return. Without proffering any evidence of involvement by the UPDF in the First Congo War, the First UN Panel Report proceeds from the premise that such involvement led directly to a decision in 1998 to return and exploit the resources of the DRC:

Some historians have argued that Ugandan forces were instrumental in the conquest of areas such as Wasta, Bunia, Beni and Butembo during the first war.

...Numerous accounts in Kampala suggest that the decision to enter the conflict in August 1998 was defended by top military officials who had served in Eastern Zaire during the first war, and who had a taste for the business potential of the region. Some key witnesses who served with the Rally for Congolese Democracy rebel faction in early months, spoke about the eagerness of Ugandan forces to move in and occupy areas where gold and diamond mines were located.

(DRCR Annex 69, paras. 26-27.)

The second UN Panel never bothered to correct this theory of the first Panel, despite the fact the theory is, as shown in Chapter II, demonstrably wrong.

415. UPDF troops were not in eastern Congo during the First Congo War in 1996-97. While it is true that Uganda gave moral support to Laurent Kabila's forces, it is *not* true that the UPDF fought alongside Mr. Kabila's forces in the anti-Mobutu war. Even when Uganda was subject to cross-border attacks from rebels aided and instigated by former Zairean President Mobutu and the Zairean State, Uganda did not deploy troops in Zaire, either independently or in aid of Mr. Kabila's AFDL movement. Uganda's non-involvement in the First Congo War was confirmed by Paul Kagame, Rwanda's Vice President and Minister of Defence, who made clear that troops from Rwanda and Angola, but *not* Uganda, were involved in the AFDL's overthrow of President Mobutu. (*Supra*, paras. 115, 161-66.)

416. Uganda's non-involvement in the First Congo War was also established by sworn testimony given before the Porter Commission. Chapter II cites the sworn testimony of the Honorable Stephen Kavuma, Uganda's former Minister of State for Defence; the Honorable Amama Mbabazi, Uganda's current Minister of State for Defence; the Honorable Kamanda Bataringaya, then and current Ambassador to the DRC; and Lt. Col. Andrew Lutaya Lugobe, the sole Ugandan who participated in the war against President Mobutu. (Lt. Col. Lugobe had been sent by Uganda to Rwanda to assist with anti-smuggling operations. He participated in the anti-Mobutu struggle at the specific request of Rwanda's then-Vice President and Minister of Defence and current President Paul Kagame.) (*See ibid.*) As the Honorable Amama Mbabazi made clear when he testified unequivocally under oath, Uganda did not have troops in the DRC when President Mobutu was overthrown:

Justice Porter:

That is our difficulty at the moment. We are trying to work out whether Uganda was directly involved in the overthrow of

Mobutu; that is what we are trying to work out.... And it would be nice if somebody could come up and say: yes, we were or no, we were not.

Hon. Mbabazi:

No, we were not.

(UR Annex 65, Part A, p. 15.)

417. The DRC's argument also ignores the expense to Uganda of the Congo war, which the DRC herself emphasises (*infra*, para. 425), and the fact that there were untapped resources in Uganda which could have been exploited without incurring such expense. A brief picture of the untapped mineral resources on Ugandan territory is provided by two documents, one a brochure targeted at potential foreign investors, *Uganda: Opportunities for Mining Investment* (UR Annex 5), and the other a more extensive description of Uganda's untapped mineral resources, *The Mineral Resources of Uganda*. (UR Annex 1.) Uganda's resources were in fact acknowledged by the DRC during a meeting between Presidents Museveni of Uganda and Kabila of the DRC held in Kinshasa on 10 August to 13 August 1997. (See UR Annex 18, pp. 11-12.) Uganda thus had her own resources which could have been exploited without incurring the expense of sending troops to another State. It is illogical to assert that Uganda chose a more costly method to secure natural resources.

418. To the contrary, as noted above in Chapter II, Uganda was forced into eastern Congo for purposes of self-defence. In fact, the attacks sponsored by the DRC not only threatened the lives of Ugandan troops and civilians, but also affected Uganda's ability to explore her own resources in her western regions, as evidenced, for example, by a memorandum by the Commissioner of Petroleum in the Ministry of Energy and Mineral Development regarding the licensing of a Canadian company, Heritage Oil Gas Limited, to carry out petroleum exploration, development and production in the Semliki Basin along the Congo-Uganda border. That memorandum noted that

the security situation in the region, including particularly cross-border attacks by the ADF based in eastern Congo, significantly hampered oil exploration in western Uganda. (UR Annex 109.) Uganda was forced to commit troops to eastern Congo to protect her own security, not to exploit the resources of the DRC.

419. The UN Panels thus embarked on their investigations in total disregard of the facts. In effect, the UN Panels' conclusions were pre-ordained once they adopted the facile premise that the UPDF had entered eastern Congo for the purpose of exploiting that area's natural resources. This critical fact is acknowledged by Congolese rebel leader Jean-Pierre Bemba, on whose book the DRC repeatedly relies, in the following stark words:

Décidé à en découdre avec les autorités rwandaises et ougandaises, le panel d'experts s'est exclusivement orienté vers la recherche de tous les indices qui attestent une exploitation des richesses naturelles du Congo par les "agresseurs". Dans les recherches, les experts ont tenté de démontrer que les armées ougandaises, rwandaises, du RCD et l'armée de Libération du Congo ont participé à un véritable hold-up....

La volonté délibérée de nuire est tellement manifeste que le panel d'experts n'a pas pris la peine d'apporter la moindre preuve des allégations relayées dans son rapport. Au lieu de s'attacher à démontrer les mécanismes éventuels d'exploitation frauduleuse, ou de rechercher des preuves tangibles de tous les faits mis à ma charge, les experts se sont contentés de produire un travail digne d'un journaliste de presse à

*scandales pour un lectorat avide de sensations fortes.*⁸⁶

(UR Annex 46, pp. 227-28.)

(2) *Uganda did not finance the war through exploitation of the DRC*

420. The First UN Panel Report, to buttress its argument that Uganda was exploiting the DRC's resources, alleges that Uganda was only able to finance her presence in eastern Congo through such exploitation. Like so many other assertions in the First Report, however, this hypothesis is demonstrably wrong.

421. The First UN Report Panel made two misguided assumptions in this regard. First, it assumed that since Uganda made a commitment not to increase her defence spending she *must have* needed external sources of funds to finance her campaigns in eastern Congo. To imbue this mistaken hypothesis with an aura of credibility, the Panel then made the added misguided argument that Uganda *must have* embezzled some taxes from eastern Congo. (DRCR Annex 69, paras. 135-42; DRCR, para. 4.28.)

(a) The UN Panel overestimated the cost of the war

422. In order to justify the first assumption that Uganda could not have afforded to maintain her campaign in eastern Congo without engaging in exploitation, the Panel used a number of incorrect figures to calculate what it assumed *must have* been

⁸⁶ "The Panel was determined to target the Rwandan and Ugandan authorities. It was exclusively aimed at finding evidence that would attest to an exploitation of the DRC's natural resources by 'the aggressors.' The experts tried to demonstrate that the Ugandan, Rwandan, RCD, and ALC armies participated in a hold-up....

The deliberate will to vilify is so obvious that the Panel of Experts did not take care to evidence the allegations in the Report. Instead of demonstrating the possible mechanisms of fraudulent exploitation or of searching for tangible proofs of all the deeds I allegedly committed, the experts produced something worthy of gutter press for a thrill-seeking readership."

the costs of maintaining UPDF troops in eastern Congo. The Panel started with the assumption that the defence allocation in Uganda's budget is around 2%. The UN Panel then proceeded to make a number of untenable assumptions: that a bonus of US\$20 per soldier was paid to each soldier; that based on a "rate of \$2,000 per hour and six hours on average for a return journey and three rotations a day, UPDF spends on average \$12.96 million per year on transportation alone," and so forth. (DRCR Annex 69, paras. 116-17.) Like every other aspect of the First UN Panel Report, these unverified assumptions are wildly off the mark.

423. The Porter Commission Report summarised the sworn evidence received from at least three credible witnesses that there was no such thing as a bonus paid to soldiers: "In paragraph 141, the Panel talk[ed] of official bonuses. This Commission has the clearest evidence that no official bonuses were paid to soldiers in the Democratic Republic of Congo." (UR Annex 65, p. 52; *see, e.g.*, UR Annex 62, pp. 33-34.)

424. The assumptions and calculations made by the First UN Panel regarding transportation costs were also contradicted by unimpeachable evidence and logic in testimony by Dr. Ben Mbonye, the Permanent Secretary in the Ministry of State for Defence (the Chief Accounting Officer):

Lead Counsel:

Can you read paragraph 117 [of the First Report] please?

Dr. Mbonye:

"On the basis of a rate of \$2000 per hour, and six hours on the average for a return journey, and 3 rotations a day, UPDF spent on average \$12.96m per year on transport alone. Other expenses for purchases, maintenance and replacement of equipment are important. According to some sources, Uganda spent \$126 million on its armed

forces in 1999, an over-spending of about \$16m."

This calculation My Lord seems to assume that there were three trips per day on a journey of six hours. I would need to calculate this into more detail My Lord - before me to ascertain that this figure would be correct.

.....

Justice Porter:

You said that you wanted to do your own calculations, and you said that there was an assumption that there were three rotations a day -- six hours for a return journey. That's what the Panel said. You had a chance to look at all this?

Dr. Mbonye:

Yes I did My Lord -- the calculation here My Lord states that there was a \$2000 charge per hour for a return journey of six hours and three rotations in a day. That would come to about -- first of all that comes to about 18 hours per day. If you consider that they would first load the aircraft, and I recall they would load until about 10.00 o'clock, 11.00 o'clock before departure, and at the same time they were not supposed to return at night from what I recall, it would not be true that they would fly at night. It was not true that they would use 18 hours in one day. They would definitely use less. And they wouldn't....

Justice Porter:

Right. So you what are saying that the calculation...is quite wrong?

Dr. Mbonye:

It's wrong My Lord.

Justice Porter:

And it is shown to be wrong by the figures which you've been producing to us?

Dr. Mbonye:

Yes My Lord, because it also assumes that they were flying three trips per day for 365 days in a year. I recall that they were not flying everyday. And even when they flew, from what I recall, it would be difficult for them to make two trips in a day; not even three. So the calculations My Lord in that provision is quite wrong. In 117.

(UR Annex 62, pp. 35-36.)

(b) The war was funded from Uganda's defence budget

425. The Porter Commission received corroborated and convincing evidence from several senior Government officials that Uganda was able to finance her campaign in eastern Congo by cutting several defence expenditures while simultaneously running a budget deficit. Dr. Mbonye testified that all operations of Ugandan troops in eastern Congo were funded by the defence budget. Because of the unexpected costs of the war in Congo, the 98/99 budget of 147 billion Uganda shillings (approximately US\$85 million) was overrun by 30%. For the financial year 99/00, however, the budgetary allocation was increased substantially to 188 billion Uganda shillings (approximately US\$107 million), which almost completely met

the cost of the war, save for a small 5% overrun. (UR Annex 62, pp. 2-12.)

426. Dr. Mbonye categorically stated that the UPDF campaign was totally funded by Uganda's budget, and absolutely no funds were received from any other source. On this point Dr. Mbonye testified under oath that:

Lead Counsel:

And in these operations,...the only source of funding to the troops was from your Ministry.

Dr. Mbonye:

It was my Lord because we would be told that some of these provisions were supposed to support the troops in Congo. And those would be for food, for chartered aircrafts and fuel provisions, and things like that. So we did provide their support from our normal budget My Lord.

Justice Porter:

You didn't expect the troops on the ground to fund themselves, by trading or doing whatever...[li]ving off the land and....

Dr. Mbonye:

No. We were always asked to make provisions for them.

.....

Lead Counsel:

Well, were the troops in the Congo at any time, in particular I am referring to some of the Colonels -- were they at any time paid

their salaries by the rebel groups in the Congo?

Dr. Mbonye:

I am not aware of that My Lord.

Lead Counsel:

Was your budget at any time supplemented by other sources other than the Treasury?

Dr. Mbonye:

No My Lord, I don't recall getting any funds from any other sources other than the Treasury. We never did.

(UR Annex 62, pp. 13-14.)⁸⁷

(3) *Uganda did not collect taxes from the transit and re-export of "exploited" resources*

427. Grasping for more support, the Panel also assumed that duties and excises derived by Uganda from goods being transited by road from eastern Congo and then re-exported from Uganda contributed heavily to Uganda's economy, providing an incentive for Uganda to prolong the conflict:

The Panel concludes that, given the absence of the exoneration on the Ugandan side, and a higher level of taxes in Uganda, customs duties related to transiting of Congolese natural resources exploited by Ugandans and some Congolese in Equateur and Orientale

⁸⁷ The testimony of Dr. Mbonye was corroborated on oath by that of Hon. Stephen Kavuma, who was the Minister of State for Defence (UR Annex 59, Part D, pp. 21-22), and Maj. Gen. Wamala, who headed the UPDF Operations in eastern Congo. (UR Annex 63, pp. 24-25.)

Provinces would bring the treasury at least \$5 million every month....

The Ugandan situation can be summarized as follows: the re-exportation economy has helped increase tax revenues, allowing the treasury to have more cash.

(DRCR Annex 69, paras. 139, 142.)

428. The Panel's theory, however, reveals a fundamental misunderstanding of Ugandan tax law. As Mr. Michael Atingi-Ego, the Acting Director of Research at the Bank of Uganda, explained under oath before the Porter Commission, the provisions of The External Trade Act (1991), together with Investment Code No. 1 of 1991 and Exchange Control (Forex Bureau) Order No. 7 of 1991, replaced the rigid application of the licensing system with a certification system whereby both exports and re-exports are not taxed in a bid to increase Uganda's non-traditional exports. (UR Annex 55, pp. 51-53.)⁸⁸ This means that Uganda derives absolutely no taxes from the so-called re-exportation economy and that the Panel's theory as to why Uganda would encourage illegal exportation is patently wrong.

429. Reinforcing this point, Mr. Atingi-Ego testified as follows:

Mr. Atingi-Ego:

...First of all, re-exports are not taxed just like any exports are not taxed so I do not know how benefits would have come in there...how will it benefit Uganda?

.....

⁸⁸ See, also, *Summary Report on the Visit to Uganda by the Reconstituted UN Panel of Experts on the Illegal Exploitation of Natural Resources of the DRC 23-25 August, 2001*, Appended to UR Annex 72, pp. 20, 21, 34-35.

Assistant Lead Counsel:

...I am talking in terms of benefit to the treasury in terms of taxes or custom duties. Please look at paragraph 138 where they make that allegation that there were trucks carrying timber, coffee, minerals, etc.

Mr. Atingi-Ego:

Paragraph 138, the very first sentence reads:

Secondly, illegal exploitation of gold in the DRC brought significant improvement in the balance of payments of Uganda.

That statement is wrong because this Commission's current account balance has been deteriorating so much, this Commission's exports are far less than this Commission's imports so I do not know how it is improving and the improvement in the overall balance of payment is largely as a result of donor in flows coming to this country not as a result of exports because there are far less compared to this Commission's imports even the tables I have here show that the current account has been deteriorating for a long time and this is being financed by donors to the extent that exports, leave alone the re-exports are not taxed. I do not see how the treasury benefits from this.

Assistant Lead Counsel:

Because you are saying that customs wouldn't be paid on transit and re-exports. Custom duties wouldn't be paid on re-exports so the treasury wouldn't benefit?

Mr. Atingi-Ego:

No they do not tax exports, any exports in Uganda are not taxed.

Assistant Lead Counsel:

The statement that the Ugandan treasury got at least 5 million dollars every month....

Mr. Atingi-Ego:

To the best of my knowledge that is not the case because the exports are not tax[e]d so how would the treasury benefit?

(UR Annex 68, pp. 54-56; *see also ibid.*, p. 54 (testimony of Justin Zake).)

F. Trade Between Uganda And Eastern Congo Is Benign And Legitimate

430. The residents of eastern Congo and of Uganda have been trading with each other since time immemorial. The UN Panel and, in its wake, the DRC cite the results of this trade, including Ugandan consumer goods being sold in shops in Gbadolite and Bunia in eastern Congo, as evidence of “illegal exploitation.” (DRCR, para. 4.25.) Nothing could be further from the truth. The DRC and the UN Panels simply ignore the fact that continued trade between eastern Congo and Uganda is a natural outgrowth of the common culture and common language shared by individuals on each side of the border, as well as the proximity of Uganda and the availability of transportation to Uganda. Moreover, the DRC attacks trade which was critical to the survival of the populations of eastern Congo, given the inaccessibility of the remainder of the DRC to that area.

431. In all their Reports, the UN Panels fail to differentiate between legal and illegal business activities in eastern Congo. In both the Second and Third Reports, also, the Panel repeats the unfathomable act of ignoring both the Lusaka Agreement

and the reality on the ground (that the rebels are administratively in control of eastern Congo). Against this backdrop, the Panels continue to view virtually *all* commercial activities in eastern Congo as illegal, including those that pre-date the present conflict in the DRC,⁸⁹ those that are specifically licenced and permitted by the DRC Government,⁹⁰ and those that are carried out pursuant to the Lusaka Agreement's injunction to create a corridor for humanitarian assistance.⁹¹

(1) *Trade between eastern Congo and Uganda has occurred since time immemorial and cannot be described as "illegal exploitation"*

432. Trade between traders of Uganda and eastern Congo has always taken place, long before the current conflict and long before any presence of Ugandan troops in eastern Congo. Such trade was, in fact, the subject of official communications between Uganda and the Government of Zaire. During a meeting between the Honorable Eriya Kategaya, then Uganda's First Deputy Prime Minister, and the Honorable Jean Marie Tumansi Kititwa, Zairean Deputy Prime Minister, in Ouagadougou, Burkina Faso on 4 December to 6 December 1996, during the occasion of the 19th France-Africa Summit, the

⁸⁹ See *infra*, paras. 432-41. Most of the trade that the UN Panel treats as "illegal" merely for the reason that it does not have the imprimatur of the DRC Government in Kinshasa, has, in fact, existed since time immemorial, even before the formation of the DRC as a State.

⁹⁰ See *supra*, para. 393; *infra*, paras. 449-55. As this *Rejoinder* and the Second UN Panel Report have demonstrated, some of the individuals and companies operating in eastern Congo were, in fact, licenced by the DRC Government.

⁹¹ See *infra*, paras. 442-48. Uganda permitted trade in essential goods specifically to ease the humanitarian crisis in eastern Congo. This was in accordance with the Lusaka Agreement, which states in Article 10:

The Parties shall facilitate humanitarian assistance through the opening up of humanitarian corridors and creation of conditions conducive to the provision of urgent humanitarian assistance to displaced persons, refugees and other affected persons.

(UCM Annex 45, Art. 10.)

latter specifically requested that the Ugandan Government facilitate the movement of Zairean merchandise and trucks transiting through Uganda. (UR Annex 9, para. 6(iv).)

433. In addition, trade was commonplace between the peoples of the Rukingiri district of western Uganda and of the Rutshuru district of eastern Congo, as was evidenced by the “good neighbourliness” meetings organised by the two countries during the period when guerillas based in the DRC started attacking Uganda. As can be gleaned from the agreed minutes of one such meeting, trade was the overarching theme of these meetings. (UR Annex 3, p. 4.)

434. The long-standing cross-border trade is further confirmed by the sworn testimony before the Porter Commission of Hon. Bernadette Bigirwa, the former District Commissioner of the Rukingiri district. Hon. Bigirwa testified that trade was unrestricted along the border with individuals trading in consumer goods such as bitenge (traditional clothes), salt, and other foodstuffs as well as commercial goods such as timber and coffee. (UR Annex 58, pp. 12-15.)

435. Similarly, Dr. Crispus Kiyonga, Minister in the Government of Uganda and Member of Parliament for Bukonzo County West in Kasese District on the border between Uganda and the DRC, gave a personal account under oath of the cross-border trade that he had actually witnessed and participated in as a boy and young man. Dr. Kiyonga first explained the trade in coffee, pointing out that it would flow from time to time in different directions, and emphasising the fact that tribal affinities were not defined by political borders:

Justice Berko:

Can you tell us something about say cross border trade between the two countries?

Dr Kiyonga:

Yes My Lord and I think *this will be helpful because many people I think they talk from hear-say but for me I live in that area.*

Justice Porter:

That's why we wanted you to come and talk to us.

Dr Kiyonga:

Yes. In 1960 when Congo got independence I was a young boy in P.4 no in P.2 in 1960. In 1962 I saw Bakongo coming to Uganda as refugees when the fighting started across there and I also saw our people in Kasese some traders getting rich in 1960, 62, 63 by trading in coffee which was coming from Congo. The Bakongo peasants more traders were bringing their coffee to Uganda for a long time I think up to may be the late 60's. The coffee was coming from Congo and bought by our people and exported by our people either through cooperatives or private traders. Then I think during Amin's time I can't remember exactly the time because I was now in secondary school not staying in the village but definitely there was a reversal our people started taking their coffee to Congo.... [Then Uganda] had reforms here economic reforms...[and] the peasants started...selling coffee here and the Bakongo started now also bringing their coffee. So on coffee as one example I would say the trade has always been oscillating depending on where the market is better it is a natural response to market forces. If the market is better in Congo we take our things there. If the market is better here we bring incidentally that border just cuts across one tribe. My people the Bakonzo people in Uganda were just ½ a million in Congo they call them Banandi but were the same people they are 3 ½ million

so we intermarry we talk the same language
and we trade, we trade together.

(UR Annex 67, pp. 8-9; emphasis added.)

436. Dr. Kiyonga then testified to the longstanding trade in timber, with products from Congo being sold in both Kenya and Uganda:

Then the other significant trade has been in timber. Timber wood for a long time since I was a small child I have seen timber coming from Congo on huge trucks. Coming some timber they sell in Kasese not so much because we have our own timber I think some of the Bakongo come and sell in Kampala here but most of it, it was being sold in Kenya for a long time. Bakongo themselves bring their timber some they sell here in Uganda most of it they were selling in Kenya. Even now if we go you will see Bakongo with their trucks carrying timber taking it across to Kenya and some they are selling here. That I have witness.

(*Ibid.*, p. 9.)

437. The long-existing trade in gold was described next by Dr. Kiyonga, who included a personal anecdote from his youth:

The other trade which was under cover is gold alluvial gold. I can testify that there are business men even now in Kasese who from that time 60's 70's used to quietly get gold from Congo from other traders and take it to Kenya to sell to Asians in Kenya I think the trade here was not so strong and the smuggling was obviously not allowed so they were doing it under cover I could tell you that when I went into exile in 1981, I was a young boy and just finished medical school I had no money I don't know where I

was going in Kenya just to save my life, so I went to one trader how do I live in Kenya? So he told me, if you have money, I can give you some gold. Oh I said I see, but where will I put the gold? He said you will sell it to the Asians. So I said I have only eighty thousand shillings. He gave me what he called four tollers. So I took them asked him how will I carry this? You put in your socks. So that's what the businessman told me. So I put in my socks I escaped across the border to Kenya he gave me telephone of this Asian I telephoned him he said "oh you are from my friends" he said "bring your (nani)" then he gave me five thousand Kenya shillings which I lived on until I got a job in Kenya. So this has been going on between our people in Kasese and may be in Kampala here and traders in the Congo.

(*Ibid.*, pp. 9-10.)

438. He also explained that eastern Congo received goods from Uganda as part of established bilateral trade which was critical to the welfare of eastern Congo:

The Bakongo what they use, their supplies in eastern Congo comes from outside, mainly things like clothing, paraffin, petrol, cement, most of the textiles comes from abroad from China from Singapore, supplies like cement like iron bars building materials, either from Kenya or from Uganda. Soap from Uganda. Plastics from Uganda. Then in return our people also get some things like timber trade the women in my constituency they go to buy a particular cloth called bitengi. They go and buy them from Congo they sell them in Kasese and here in Kampala. They go and buy plates, kitchen ware and bring here. So trade goes

on there and nobody can stop that trade, that I can be sure. Even if you put troops there, you cannot stop that trade. It has to respond fast that these are the same people, secondly they have needs, and they look where there is a supplier and where there is a market.

(*Ibid.*, p. 10.)

439. Finally, Dr. Kiyonga pointed out that eastern Congo has been endowed with natural resources, but has suffered from maladministration since 1960, when Congo became independent:

That's what I would say about trade but what My Lords could also be relevant to this Inquiry and also to the UN, these Congo people are really suffering people, and the result of their suffering we will all suffer not only from security, from fire even from disease, you see we are always getting Cholera from Congo because there is no administration there. In my constituency we have a hospital we've just built recently, if you go something like 30-40% of the people who come to attend are from Congo. They are suffering people, Congo is in my view, richly endowed with these minerals, with forest, with water, so for me I would be happy if the UN was asking where have the resources of Congo been going since 1960? They would just ask about 1996 where have the resources of Congo been going, since 1960? The country is still poor, you go and see those poor peasants, there are no roads, there is no power supply, and yet these resources have been going who has been taking them. The UN really would help Congo as now we hope they will democratized to ask these questions. Who has been taking the wealth of Congo not

since 1998 but since 1960, when Bakongo got independence. The mining has been going on who has been taking this money.

(Ibid., pp. 10-11.)

440. The Porter Commission noted testimony, such as that of Dr. Kiyonga, that the same ethnic groups and families reside on each side of the border, and that there has been cross-border trade in one form or another “since time immemorial.” (UR Annex 68, p. 42.) That trade, the Commission noted, is widespread and not haphazard:

Further, the cross border markets are not some hole in the corner affair. There are market days arranged by agreement from both sides of the border, and proper arrangements in the market places: the best market this Commission saw was in Ariwari which was fully stocked with an array of goods for local purchase. In Mpondwe and Kasindi there were representatives on both sides for Chamber of Commerce, and proper arrangements for resolution of trade disputes had been put in place. Every sign that this Commission saw was the OFIDA and Ugandan Customs were operative and visibly present.

(Ibid., p. 43.)

441. It thus would have been not only futile but also inimical to the population of eastern Congo to prevent trading in that region. The Security Council has recognised that inescapable fact. For example, in the discussion on the First UN Panel Report, the Representative of Colombia stated:

[W]e recognize that, for a long time now and because of its geographical location, the eastern part of the Congo has strong economic links to the neighboring countries. That is why it came as no surprise to us that

there is an active import-export trade there. It is appropriate nonetheless to preserve the mutual benefits of that trade with a view to the future reconstruction of the economy of the Great Lakes region. Any peace conference for that region should take that aspect into account.

(UR Annex 53, p. 4.)

(2) *The trade which the DRC attacks was essential to the survival of the population of eastern Congo*

442. The trade was particularly critical to the survival of the population of eastern Congo because that area was cut off from the rest of the DRC. Thus, had cross-border trade with Kenya, Uganda, Rwanda and Burundi not taken place, eastern Congo would have had no market for its goods and no source of goods for its population. As has been authoritatively established by many international bodies, including the United Nations and the United States Agency for International Development (USAID), eastern Congo has been “inaccessible due to decades of collapsed infrastructure.” (UR Annex 74.) Indeed, without roads or railway, the only major artery for transport between western Congo and eastern Congo would have been the Congo River, but this was blocked off from the delivery of commercial and/or humanitarian goods and services from August 1998, when the rebellion against the DRC Government commenced, until July 2002.⁹² The UN Secretary-General points out that the 12 barges which set off from Kinshasa to Lisala and Bumba in 12 July 2002 were the first commercial exchange between Kinshasa and eastern Congo in nearly four years.⁹³ In the

⁹² See The Tenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (DRCR, Annex 35, paras. 19 & 20); The Eleventh Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (S/2002/621), para. 19; The Twelfth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo (S/2002/1180), paras. 36 & 37.

⁹³ *Ibid.* (The Twelfth Report), para. 36.

circumstances, and in the absence of any other alternative means of transportation, eastern Congo was only accessible through routes transiting eastward toward Uganda and Rwanda or by flights from these two States.⁹⁴

443. The DRC's suggestion that trade between eastern Congo and Uganda should have been prohibited ignores the interests of those within the DRC's borders. The DRC's allegations are even more disingenuous because eastern Congo has historically been linked to the world through these eastern routes, not as a result of the current conflict in the DRC but due to geographical, socio-economic and legal imperatives including various regional arrangements such as the Common Market for Eastern and Southern Africa (COMESA) and the Northern Corridor Arrangement. Mr. Patrick Mazimpaka, Special Envoy of the President of Rwanda, made this point during the Security Council debate on the First UN Panel Report:

Secondly, the Panel extended the definition of natural resources and other forms of wealth to include services, transport, finance and other movements of goods and people. In our region, these are regulated by multinational agreements, which include those between our three countries - the DRC, Burundi and Rwanda - and the conventions of the Economic Community of the Great Lakes Countries (CEPLG), as well as regional arrangements, such as those under the Common Market for Eastern and Southern Africa (COMESA) and the

⁹⁴ The Government of Rwanda stated the same point in its official response to the First UN Panel Report:

The eastern part of the Congo has been cut off in terms of international air communication. In the face of this situation, the Congolese goods and people have found it necessary to transit through Kigali, for there are no international flights to Goma and Bukavu. Provisions of these services are not prohibited by any existing international laws.

(UR Annex 52, p. 8.)

Northern Corridor Arrangement; these conform also to World Trade Organization conventions.

Ignoring these historical ties among the peoples of the region is prejudicial to the socio-economic well-being of the people of the region, and more particularly those of the DRC cut off from Kinshasa, and who have been historically linked to the world through eastern routes through Rwanda, Burundi and Uganda.

(UR Annex 53 (AM Meeting), p. 9.)

444. It follows, therefore, that the trade between Uganda and eastern Congo that the DRC seeks to criminalise is in fact the subject of various international agreements binding Uganda to facilitate that very trade. Two such agreements are the COMESA Agreement (referred to above), and the agreement establishing the Transit Transport Coordination Authority for the Northern Corridor (TTCA), which was signed in 1985, and which, among other things, obligates Uganda, Rwanda, Burundi, the DRC, and Kenya to ensure a smooth and efficient flow of traffic between Bujumbura, Kigali, eastern Congo, Kampala and the port of Mombasa in Kenya. As Hon. Mbabazi told the UN Security Council, the prime objectives of the agreement are to ensure freedom of transit among the signatory States, to wit Kenya, Uganda, Rwanda, Burundi, and the DRC, to safeguard the right of access to and from the sea for landlocked countries, to promote the development and regional integration of transport facilities and services, and to facilitate inter-state trade:

I also wish to point out that there is an agreement establishing what is called the Transit Transport Authority for the Northern Corridor, which was signed in 1985 by Uganda, Rwanda, Burundi, the Democratic Republic of the Congo, and Kenya. The mandate for this Transit Transport Authority

is to ensure efficient flow of traffic between Bujumbura, Kigali, the Democratic Republic of the Congo, Kampala, Nairobi and the port of Mombasa [Kenya] -- in other words, a hinterland Mombasa port. A number of infrastructure projects under this Authority are supported by the World Bank, the European Union, and other donor agencies. At the fourteenth ministerial meeting of this Northern Corridor, in Kampala on 23 November 2001, Uganda reiterated its commitment to ensuring smooth traffic flows through Uganda to strengthen regional initiatives for infrastructure development and to harmonize customs documentation and procedures along that corridor.

(UR Annex 73 (AM Meeting), p. 13.)

445. Indeed, in most cases the trade between eastern Congo and Uganda involved traders bringing merchandise from eastern Congo into Uganda, where they bought Ugandan goods for sale in eastern Congo. (*See supra* paras. 432-40, 443-44.) The UN Panel itself noted the dependence of eastern Congo on consumer goods from Uganda. (DRCR Annex 69, para. 64.) However, contrary to the interpretation of the UN Panel and the DRC Government (DRCR, para. 4.25), the presence of Ugandan consumer goods in these areas is simply an indication of trade between Uganda and eastern Congo, and invites no inference of illegality.

446. In fact, long before the current conflict Ugandan and Congolese business people had started flying the variety of consumer goods manufactured in Uganda into eastern Congo, due to the difficulties in communications between this part of the DRC and Kinshasa, in western Congo. This fact was testified to before the Porter Commission by Hon. Kamanda Bataringaya, the Ugandan Ambassador to the DRC:

Dr. Bataringaya:

Yes. Oh, this promotion of trade you see as I told you, as commercial diplomacy, now, when I went there, there was trade, trying to normalizing it this way, as we had Ugandan Airline flying up to Kinshasa, flying up to Goma, Ugandans were able to take the merchandise up to Kinshasa, that's meat, fish, eggs, which were really by then selling, they were using Uganda Airline, even up to Goma. And those even these lorries, some of them, our people who are in West Nile, they were using those which used to go to Bunia, the market, and these also the Congolese, even Beni, bring their goods also to Bwera, Kasese. So, that's how we were trying to encourage that trade.

Lead Counsel:

So, the trade was basically, in terms of, as we shall say things like eggs, fish, meat.

Dr. Bataringaya:

Eggs, fish, meat, soft drinks like Coca-Cola, Pepsi-Cola, Beers. I would see them even exchanging in bringing Pilsner in Uganda, our Bell in Congo. Those are the things, they are.

Lead Counsel:

And how were most of those things getting to the DRC?

Dr. Bataringaya:

They were, just, say in Kinshasa, they were using the Uganda Airlines, by the way it was and Goma also. And these near-by places

were using lorries, and other small vehicles.
And sometimes, boats, for example on Lake
Albert.

(UR Annex 61, pp. 19-20.)

447. Uganda has repeatedly stated that her policy on eastern Congo was to facilitate trade between bona fide Ugandan and Congolese business people so as to ensure that the local populations in eastern Congo were able to obtain the material necessities of life. The radio broadcast of President Museveni himself (UR Annex 31), the official responses by Uganda to the Panel Reports (*see, e.g.*, UR Annex 55, p. 20), and the testimony of Minister of State for Defence Hon. Stephen Kavuma made under oath to the Porter Commission confirm this official policy. Mr. Kavuma, citing a 1999 press release articulating the policy, testified that the only trade that Uganda encouraged as a matter of policy was that aimed at ameliorating the humanitarian crisis in eastern Congo by ensuring that necessary consumer goods reached the region:

Mr. Kavuma:

But [the Ministry of] Defence, as an institution, did not authorize the carrying of gold, carrying of coltan, carrying of diamonds, *sijuyi nini*, to.... We were concerned with the carrying of supplies of consumer goods.

.....

Lead Counsel:

Now your statement, or the statement attributed to you there, shows that you were actually allowing Congolese businessmen to fly on flights which probably had military hardware (or logistics as you call it) to the Congo. Now I am assuming that wherever that plane landed there would have been

UPDF troops there to off-load the logistics.
Am I correct on that?

Mr. Kavuma:

Yes. UPDF would be represented, yes.

Lead Counsel:

Now that would mean you therefore, have businessmen interacting with soldiers (because they are appearing at the same airport and they are moving together)?

Do you not think that this would encourage the soldiers to try and engage in business, or the businessmen to take advantage of the soldiers and do business -- or in furthering their businesses?

Mr. Kavuma:

Yeah. I think this has to be looked at..., really the situation obtaining in the Congo. Here is a population, a huge population, lacking consumer goods. You are faced with saying: no consumer goods on our aircrafts which are on military missions. The risk you are posing to the population, I think, outweighs the risk you are talking about. I would be more interested in seeing that if I get somebody who is infringing the regulations I would deal with them in accordance with the law; but I would not put at risk the lives of men, women and children in tens of thousands.

.....

My Lord, it is a difficult situation where transport means are very, very scarce and difficult to come by, where you have

millions of people who need consumer goods for livelihood, and then you have to take a decision as to whether to allow them to access those goods running a risk of operating not in the usually-normal way. Or you say, look these are the instructions: this and this should happen, this and this should not happen, and that was done by Government; then you put in place people to administer the scheme, who are supposed to follow the law and the instructions. And I think, in those circumstances, one would have done what one would have been expected to do in those very difficult circumstances. This is all I am saying, My Lord....

.....

My Lord, I do not know about the details of whether they were charging this or not but if I were faced with a situation where a Congolese soul is to die because of hunger for fear that one sack of coffee could find its way at the airbase, I would save the life and soul of the Congolese person and leave the rest to be handled in accordance with the law about who trades illegally. I would not put the life of an African over and above coffee, beans, tobacco; I think it would be inhumane on my part!

(UR Annex 59, Part C, pp. 20-21, 23-24.)

448. As Mr. Kavuma explained, Uganda pursued trade as a policy to ease the humanitarian crisis in eastern Congo by making essential consumer goods available to the residents of that area.

(3) *Trade in eastern Congo was licenced by the DRC Government and by the competent authorities*

449. In fact, companies that were trading in eastern Congo were fully licenced to operate, in many cases by both the DRC Government as well as the rebel organisations in effective control of, and with administrative authority for, the region. It is hypocritical for the DRC to complain that the trading was illegal without acknowledging her continued role in such trading.

450. The DARA-Forest case described above is evidence of the DRC Government's continued role in the exploitation of natural resources in the eastern Congo. Although the UN Panel Report presented DARA-Forest as an appalling case of "illegal" exploitation, it was shown that DARA-Forest was, in fact, fully licenced by the DRC Government. (*Supra*, paras. 390-93.)

451. The Second UN Panel Report (DRCR Annex 70) notes that the operations in Kisangani -- which is rebel-controlled -- of a company called Arslanian Freres had the blessing of the DRC Government:

[Arslanian] has been traveling to Kisangani to openly purchase diamonds mined in the rebel-held areas surrounding the town [Kisangani]. Nevertheless, one of the owners of the company, Raffi Arslanian, was approached in writing in 2001 by the Government's Minister of Mines to invest in a multi-million-dollar project aimed at re-organizing the State-owned diamond-producing enterprise MIBA.

(DRCR Annex 70, para. 74.)

452. The fact that the DRC Government was involved in licensing companies engaged in the exploitation of natural resources in eastern Congo directly calls into question the credibility of the First UN Panel Report -- which was oblivious to this easily ascertainable fact. It also calls into question the

credibility of the DRC Government -- which attacks trade in eastern Congo, knowing full well that it has continued to licence trade in that region.

453. In addition, insofar as the DRC is alleging that any business activity in eastern Congo was impermissible if not licenced by the DRC Government, the argument would be foreclosed by the Lusaka Agreement. (*See supra*, paras. 204-210.) The trade now attacked by the DRC came within the area of competence of the RCD or MLC as the responsible authority under the Lusaka Agreement, and before the Agreement as the *de facto* government. If economic activity had to wait for a licence or approval from the Government of the DRC, the natural economic activity of eastern Congo would have been strangled and the population of that area would have suffered even more. The DRC cannot challenge economic activity in eastern Congo simply because such activity was not licenced by, or paying taxes to, the Government of the DRC.

454. It should, in fact, be noted that the AFDL, President Kabila's own rebel organisation, prior to the time it came to power in Kinshasa, itself took the position that a rebel group which exercises effective control over territory has the authority to grant concessions and licence operations in the territory which it controls. Thus, a source cited authoritatively by the *Reply* describes the AFDL as entering US\$1 billion worth of contracts granting concessions in areas it controlled:

Le 16 avril 1997... flanqué de ses avocats, de ses experts financiers et du colonel belge Willy Mallants...l'homme d'affaires américano-mauricien Jean-Raymond Boule signe avec le 'ministre' des Finances de l'ADFL Mawa Nanga Mawapanga et avec le 'ministre' des Mines Mutombo un contrat prévoyant un investissement total de 1 milliard de dollars. Les accords immédiats portent sur trois sites: un projet de 200 millions de dollars à Kolwezi, pour l'extraction du cuivre et du cobalt, un investissement de 30 millions de dollars

*destiné à l'extraction du cobalt à partir de très riches déchets des mines de cuivre du Kipushi, et un investissement de 550 millions de dollars, à Kipushi également, dans une usine de traitement du zinc.*⁹⁵

(Colette Braeckman, *L'Enjeu congolais: L'Afrique centrale après Mobutu*, Fayard (Paris), 1999, p. 156.)

455. The signatories to the agreements made clear their view that the authority to sign such agreements rested in the rebels who controlled the territory (then, the AFDL) rather than the Government of President Mobutu which was then in power in Kinshasa:

'[L'AFDL] exerce le contrôle de fait sur le territoire concerné. Cet accord, conclu dans la transparence, est parfaitement légal, même si les autorités actuelles ne sont pas encore au pouvoir à Kinshasa.' Le 'ministre' des Finances ajoute: *'Quand à ceux qui veulent signer un accord aujourd'hui à Kinshasa, je leur demande seulement comment ils feront pour venir l'appliquer ici au Shaba.'*⁹⁶

⁹⁵ "On 16 April 1997...with his lawyers, his financial experts, and Belgian Colonel Willy Mallants...the American-Mauritian businessman Jean-Raymond Boule signed with the AFDL 'Minister' of Finance, Mawa Nanga Mawapanga, and with the 'Minister' of Mutombo Mines, a contract [totaling] \$1 billion. The immediate agreements referred to three sites: a \$200 million project in Kolwezi to extract copper and cobalt, a \$300 million investment to extract cobalt from the very rich waste of Kipushi copper mines, and a \$550 million investment, also in Kipushi, into a zinc treatment plant."

⁹⁶ "[The AFDL] exercises effective control over the territory in question. This agreement, concluded transparently, is perfectly legal, even if the current authorities are not yet in power in Kinshasa.' The 'Minister' of Finance added: 'With regard to those who wish to sign an agreement today in Kinshasa, I only ask how they will enforce it here in the Shaba.'"

(*Ibid.*, p. 157.)⁹⁷

G. The Specific Allegations Against Uganda Are Contradicted By Sworn Testimony And Documentary Evidence

456. As discussed above, the UN Panel Reports, and in particular the First UN Panel Report, the cornerstone of the DRC's allegations, are based on unsworn accusations by unidentified persons. The so-called "sources" were not subject to examination which could verify whether their statements were willfully false, the product of inaccurate recollections, the repetition of what a source may have heard but did not personally witness, or (if ever) the truthful and accurate recounting of personal knowledge. The UN Panels' "sources" were not even identified, critical information which could have provided evidence of whether or not they were biased and had reason to seek to attribute blame to Uganda or, indeed, any other country.

457. Furthermore, no transcript of the questioning of the "sources" was provided, which could reveal whether the sources were induced to give their statements by suggestive or leading questions, something which cannot be dismissed out-of-hand given the UN Panels' preconceived (and manifestly inaccurate) notions that Ugandan troops had previously operated in eastern Congo, and that the top UPDF officials were simply waiting for a pretext to reenter and to exploit the DRC's natural resources. Finally, of course, none of the so-called sources on whom the UN Panels relied were sworn. In light of the use of these statements to impugn Uganda and other States, it is incredible that the UN Panels were so careless in their efforts to ensure the reliability of the statements they were collecting.

⁹⁷ At least six companies, which the Third UN Panel Report states should be "blacklisted", signed contracts with Mr. Kabila and the AFDL before the former took over power in Kinshasa. (Braeckman, *supra*, pp. 156-161.) These include AMFI, Anglo-American PLC, Ashanti Goldfields, Banro Corporation, Lundin Group, and Tenke Mining Corporation, all of which signed agreements that the DRC Government presumably deems valid. (*Ibid.*)

458. Not only are the UN Panel Reports inaccurate, but also the DRC often cites those Reports inaccurately. The DRC, for example, asserts that “officers of the UPDF systematically looted” the areas which they occupied, stating that this was “confirmed” by the First UN Panel Report. (DRCR, para. 4.14.) That Report, however, even if it is to be credited, merely states that “Burundian, Rwandan, Ugandan and/or RCD soldiers” were engaged in looting. (*Ibid.*; emphasis added.) The quoted language does not assign responsibility to Ugandan soldiers, making no effort to draw a distinction between Burundian, Rwandan, Ugandan, and RCD soldiers, but rather lumping them all together without a considered assignment of responsibility. Moreover, the very paragraph of the UN Panel Report quoted by the DRC later goes on to state that there was unlawful removal of products “by Rwandan *or* Ugandan armies and their local RCD allies.” (DRCR Annex 69, para. 32; emphasis added.) Again, there was no reasoned assignment of responsibility.

(1) *So-called instances of “unlawful appropriations” by “Ugandan troops” are demonstrably false*

459. The *Reply* offers three “particular” alleged incidents in support of its assertions that “Ugandan troops were responsible” for “unlawful appropriations.” (DRCR, para. 4.15.) The failure of the DRC to make out any case against Uganda is demonstrated by the fact that each of these three purported incidents utterly fails to establish any responsibility on the part of Ugandan troops. Either the allegations of the First UN Panel Report are refuted by the facts or that Report fails to attribute unlawful activity to Ugandan troops in the first place.

460. The DRC, for example, parrots claims of the First UN Panel Report that Gen. Kazini confiscated all the timber stocks of a logging company called La Forestière. (DRCR Annex 69, para. 34.) In an attempt to support this allegation against Gen. Kazini, reference was made to some hearsay information from an unidentified third-party source that Gen. Kazini was “reportedly seen in the area at least twice during the period when the looting occurred and temporarily established his

headquarters in the area.” (*Ibid.*) Accusing Gen. Kazini of looting on the basis of such information, even if accurate, is an obvious *non sequitur*, which puts in high relief the bias and carelessness of the First UN Panel Report.

461. There is, moreover, documentary evidence which establishes the incompetence of the UN Panel’s work. A memorandum recorded the official handover of the La Forestière factory and timber stock to the owners of the company. That handover memorandum, signed by UPDF officers and representatives of the company, states unequivocally:

This day 02 of June 2000, the UPDF Administration has handed over the factory premises and property which we occupied during the presence of the factory Manager (La Forestiere) in 1998. All the buildings, property have been found intact the way they were handed over to UPDF during the time of occupation. We (UPDF) together with the Factory Manager (Administration) inspected everything and no complaints were raised.

(UR Annex 40.) The handover memorandum categorically confirms that the company had no complaints, of looting or otherwise, against the UPDF.

462. As another example, the DRC claims that UPDF troops under the direction of Gen. Kazini “absconded” with stockpiles of timber from Amex Bois Company in late August 1998. It was, however, established by sworn testimony that Amex Bois was transmitting stockpiles of timber through Uganda shortly after the looting was alleged to have taken place, further discrediting the allegations of the DRC and the First UN Panel Report. (UR Annex 68, pp. 23–24.)

463. As the third purported example of the alleged culpability of Ugandan troops, the DRC, relying again on the First UN Panel Report, asserts that in January 1999 “General Kazini

organised a large operation for the confiscation of coffee beans.” (DRCR, para. 4.15.) Even if the UN Panel Report were taken at face value -- which it obviously cannot be given its manifest deficiencies -- it does not support the DRC’s allegations. The DRC has again chosen to read what she wants into her source documents, and does so only by ignoring their actual content.

464. Although there is a sentence in paragraph 35 of the First UN Panel Report which states that “Jean-Pierre Bemba and Gen. Kazini organised a large operation for the confiscation of coffee beans,” the mention of Gen. Kazini is unsupported by the so-called evidence which the Report cites next. Indeed, there is *no* further mention of Gen. Kazini in the discussion of the purported evidence. Rather, immediately after the sentence mentioning Gen. Kazini, the next sentence makes clear that *Mr. Bemba* (of the MLC, not the UPDF) allegedly organised the operation: “*Mr. Bemba* initiated, encouraged and perpetuated such practices in the Province.” (DRCR Annex 69, para. 35; emphasis added.) Further, *Mr. Bemba* was alleged to have written a letter encouraging the practice, and it is later again emphasised that *Mr. Bemba* was the person who allegedly confiscated the coffee beans: “The massive looting reached such levels that, in one instance, *Mr. Bemba* seized 200 tons of coffee beans from the SCIBE company, which was owned by his father, Saolona Bemba. The matter remains unresolved in Court.” (*Ibid*; emphasis added.) In short, although the First UN Panel Report alleges that Gen. Kazini somehow “organised” an operation to confiscate coffee beans, it offers not even hearsay or double-hearsay evidence to support that charge.

(2) *The DRC persistently relies on unsupported hearsay and inaccurately cites her supporting sources*

465. The DRC habitually relies on vague generalities and unfounded allegations that have no probative value. Thus, it is alleged that Professor Wamba dia Wamba of the RCD/K stated to a Danish newspaper that “several high-ranking Ugandan officers organise looting.” (DRCR, para. 4.16.) The DRC’s resort to this newspaper report exemplifies the profound and

pervasive inadequacies of the DRC's presentation. The newspaper report is hearsay stacked upon hearsay -- a newspaper reporter saying what Prof. Wamba dia Wamba supposedly said -- with no basis for determining whether Prof. Wamba dia Wamba was accurately quoted by the reporter, or, even if he was, whether Prof. Wamba dia Wamba had any basis for his statement. Moreover, the statement is particularly useless as evidence, for it gives no specifics as to the identities of the Ugandan officers who purportedly "organised" any looting, nor does it give any specifics of the "looting" that purportedly occurred. Reliance on such second- and third-hand, unverified, and unsworn publications manifestly reveals the inadequacies which permeate the DRC's accusations against Uganda. (See the *Nicaragua* case, I.C.J. Reports 1984, p. 40, para. 63 ("press information should not be treated in itself as evidence for judicial purposes."))

466. In alleging that the UPDF and Ugandan officials looted mineral resources (DRCR, para. 4.18), the DRC again misstates the First UN Panel Report -- further distorting an account which was already substantially distorted and subject to attack on its own merits. With regard to alleged mining of gold, the UN Panel -- yet again without identification of any evidentiary basis -- stated that it "*appears* that" local commanders tolerated mining by soldiers, which the Panel "qualifie[d]...as passive complicity." (DRCR Annex 69, para. 57.) Of course, in acknowledging that something only "appear[ed]" to be the case, the UN Panel effectively acknowledged that it possessed no evidence. Although the DRC cites the First UN Panel Report as a source of factual evidence, that Report by its own terms ("appears that") establishes that it contains nothing more than supposition and speculation. In any event, these unverified and unsupported claims should be viewed against the sworn testimony of officials with firsthand knowledge of the situation, who unanimously testified that the UPDF had strict policies against mining and trading by soldiers that it rigorously enforced.⁹⁸

⁹⁸ See, e.g., the sworn testimony of Maj. Gen. Katumba Wamala, who headed UPDF operations in the DRC between August 2000 and April 2001

467. Similarly, while the DRC treats allegations that young men were sent “to extract [gold] for the benefit of Ugandans” as established fact (DRCR, para. 4.18), the First UN Panel Report actually provides no basis for imputing liability to Uganda. In fact, it says quite the opposite. The Report states: “Local Congolese have been mining for years for their own benefit.” (DRCR Annex 69, para. 58.) It then states that MLC leader Jean-Pierre Bemba recruited the young men and that the “Ugandan allies” (again, *not* Uganda) “trained the recruits.” Thus, even if the factual allegations of the First UN Panel Report were true, which cannot be said with any semblance of assurance given the many errors that permeate the Report, *nothing* in the Report supports any conclusion that any such mining was being done “for the benefit of Ugandans.”

468. The same lack of an evidentiary basis infects the First UN Panel’s, and consequently the DRC’s, allegations concerning gold mining in the Kilo-Moto mineral district. (DRCR, para. 4.18.) The Panels’ allegations depend on an unidentified “key informant” as well as unidentified “other sources” (DRCR Annex 69, para. 59), as well as on unspecified “evidence” and facts that were “reportedly” true. (DRCR Annex 70, para. 28.) Again, there is no basis for concluding that any “informant,” “source” or “report” was truthful, unbiased, or had any actual knowledge at all of the allegations being made.

(UR Annex 63, pp. 14-15), and of Hon. Stephen Kavuma, Minister of State for Defence during the period, whose testimony under oath on this point was that:

[O]ur soldiers, our army, was under very strict instructions not to engage in business or exploitation of resources from the DRC. The Commander-in-Chief had given these instructions, very firm instructions, right at the outset of the UPDF’s going to Congo and those instructions were being adhered to; and the Government and the army were ready, willing and able to take very, very stern action against anybody who would be found infringing those instructions.

(UR Annex 59, Part B, p. 6.)

469. The patent bias and incredibility of the UN Panels is evidenced by the fact that the Second UN Panel Report persists in the allegations that UPDF forces continued to be involved in artisanal gold mining in the Kilo-Moto area at the time of that Report, October/November 2001 (DRDC Annex 70, para. 28) despite the fact that the UPDF had long been withdrawn from that area. Uganda had withdrawn her troops from the Isiro area, where the Kilo-Moto mines are, in May/June 2001, and had officially informed the UN Security Council of that withdrawal in a letter dated 8 May 2001. (UR Annex 57.)

470. Moreover, the factual allegations of the UN Panels regarding diamond mining in the northern Kisangani area -- even if true -- show the culpability of Rwandan forces rather than those of Uganda. Thus, in referring to the Kisangani area, the Second UN Panel Report states that “[t]he high combined taxes imposed by the RCD-Goma rebel group *and* RPA ultimately resulted in diamonds mined in this area being redirected to Kampala, where lower tax rates prevail.” (DRCR Annex 70, para. 44; emphasis added.) These allegations show that it was Rwanda that was operating within the Kisangani area of the DRC and imposing taxes in that area, with the diamond miners making their own independent business decision to send diamonds to Kampala. Even if the Panels’ allegations were, for the sake of argument, taken as true, there is no suggestion of any coercion or exploitation by Uganda.

471. Finally, the DRC cites page 19 of Annex 75 to her *Reply* to support the assertion that “Ugandan troops were exploiting up to 800 Km² of forest.” (DRCR, para. 4.18.) Page 19 of Annex 75 does not refer to “Ugandan troops,” or to “exploiting,” or to “800 Km² of forest.” If the DRC meant to refer to page 18, which does refer to the UPDF, the document makes no assertion, much less provide any evidence, that the UPDF was exploiting 800 Km² of forest. Even if page 18 of Annex 75 were credited, all that it refers to is the supposed “location” or “position” of troops, and the “existence” of natural resources, with no reference at all to “exploitation” of those resources. (See DRCR Annex 75, p. 18.)

472. Thus, throughout her *Reply*, the DRC relies on UN Panel Reports that in turn depend on unsubstantiated “information.” But, as demonstrated above, the DRC goes even further and compounds the errors of the Panel Reports. Thus, the DRC takes statements in the Panel Reports which are qualified or ambiguous, or which actually impute blame to actors other than Uganda, and in her zeal to vilify Uganda inaccurately cites those sources as unequivocal allegations against Uganda.

(3) *The DRC’s allegations about air flights are either unsupported or are demonstrably wrong*

473. The DRC asserts that military and private flights were used to “*acheminer vers les aéroports ougandais le produit du pillage organisé par l’UPDF.*”⁹⁹ (DRCR, para. 4.21.) The *Reply* again relies on the First UN Panel Report, the very terms of which (“[a]ccording to some sources,” “[t]he Panel has indications”) effectively concede that the Panel was basing its allegations against Uganda on hearsay and on speculation, rather than on credible evidence. (DRCR Annex 69, para. 74.) And, where the DRC purported to rely on sources other than the First UN Panel Report, the source documents were not quoted correctly.

474. Thus, the DRC asserted that “*le nombre de vols d’avions privés entre l’aéroport militaire d’Entebbe et le Congo se monte à 5300 pour la période 1998-2001*”¹⁰⁰ (DRCR para. 4.22), but the source document referred to the number of *passengers*, not the number of flights. (See DRCR Annex 14, *The Monitor*, 15 August 2001.) The DRC’s inaccurate citation of the source document carelessly (or intentionally) greatly exaggerated the amount of transit between Entebbe and Congo.

⁹⁹ “bring back to Uganda products that had been illegally exploited from the DRC by UPDF officers.”

¹⁰⁰ “the number of flights of private planes between the Entebbe military air base and Congo rose to 5,300 in the period 1998-2001.”

475. In any event, even the First UN Panel Report, for all its inaccuracies and proclivity to cast blame on Uganda, acknowledges that the flights were simply the continuation of the “old transportation network that existed prior to the 1998 war” and that the “pattern of transport remains similar today” to “these pre-existing networks and structures.” (DRCR Annex 69, para. 31.) As further set forth at length above (*supra*, paras. 432-48), the continuation of the historical modes of transport between eastern Congo and Uganda, including transport by air, was critical to the survival of the populations of eastern Congo who were cut off from the rest of the DRC by the war.

(4) *The “economic data” on which the DRC relies proves nothing*

476. The DRC relies on purported “economic data” to support her claims of exploitation. (DRCR, paras. 4.23-4.24.) As the World Bank and other international financial institutions have recognised, Uganda has a long record of sustained economic performance and fiscal stability because of its sound economic policies and good governance. (*See* UR Annex 55, Table 1, p. 33 for a tabulation of Uganda’s real GDP Growth rates between fiscal years 1994/95 and 1999/2000.) This has attracted foreign direct investment, developmental aid and debt rescheduling by multinational bodies, all of which have contributed to the dynamism of Uganda’s economy. As already explained, Uganda has her own deposits of minerals and there is established and legitimate cross-border trade between Uganda and eastern Congo, including activity by producers and companies licenced by the DRC Government. (*Supra*, paras. 393, 449-55.) There is no basis for the DRC and the UN Panels to read Uganda’s legitimate economic growth as evidence of illegal exploitation of resources in the DRC.

477. Moreover, any so-called “discrepancies” between Uganda’s mineral production and her exports can readily be explained by statistical, regulatory and market factors.

478. A statistical factor contributes to the so-called discrepancy between production and export figures. The UN Panel relied on data from the Ministry of Energy and Mineral

Development to indicate levels of export. The Ministry's figures, however, are calculated from export *permits* issued by the Ministry. As such, they indicate the amounts of gold the trader-applicants applied for *authorisation* to export from Uganda, and not the figures that they *actually* exported. In fact, the amount actually exported is almost always far lower than the amount indicated in export permits, so that use of data from the Ministry exaggerates the amount of gold actually exported. Data from the Customs Department more accurately indicates the amounts of gold actually exported, a number that fluctuated between 1995, when it was US\$26.6M, and 1999, when it was only marginally higher at US\$28.3M. (UR Annex 55, pp. 37, 51-52, 61.)

479. With respect to regulatory factors, in 1991 Uganda enacted The External Trade Act of 1991 and the Ministry of Tourism, Trade and Industry promulgated the Exporters and Importer' Guide, both of which embraced liberalisation as a trade policy. (UR Annex 55, pp. 51-52; *see also supra*, para. 428-29.) With the liberalisation, royalty charges for exports were removed. As a result, there was no longer an incentive for exporters to underreport the volume of exported minerals. During the period after 1991, gold exploration within Uganda has expanded. (UR Annex 110, p. 22.) At the same time, however, the reported Ugandan production figures have been artificially understated because many small-scale producers who are unlicensed do not report their production for fear that they might be prosecuted for operating without licences. These producers, however, sell their unreported output to the licensed traders who export. The traders then report these products as exports, making the export figures larger than the production figures. (*See* UR Annex 55, p. 51-52.)

480. The effect of the new regulations governing the production and export of gold and other minerals was explained by the former Minister of State for Defence, Hon. Stephen Kavuma, in sworn testimony before the Porter Commission:

Lead Counsel:

Now that paragraph alleges that,

“...the Government of Uganda and that of Rwanda were aware of the situation on the ground, including the looting of stocks from a number of factories. In some cases level of production of mineral resources would have alerted any Government, such as those of gold for Uganda and coltan for Rwanda, of this.”

Mr. Kavuma:

Again these are sources to the Panel. I can only say that at no time the Government of Uganda ever participated or even supported the looting of what is being talked about here. I was not aware of any massive looting of stocks as being alleged here.

The level of production, I want to say what I said a little earlier: I think the policies of liberalization and allowing people to operate accounts – dollar accounts – with maximum retention of whatever they get (100% retention) helped in unearthing trade that had been going on in this commodity, but under cover for fear of Government discovering them. Of course people have been trading in this gold, both from within the borders of Uganda and, for centuries, there has been cross-border trade by small, small peasants who go and get alluvial gold and the rest of it.

Now, these figures, I think a lot of it has (and I am confident it is the case), has to be explained by the economic policies which were able to stimulate trade and give confidence to the traders that they can openly transact their business without any fear from Government. So I do not find anything strange about this.

.....

But these small things being harvested by peasants in terms of alluvial gold, if somebody got an ounce and found a way of getting rid of it; I do not think that is anything strange. After all, their ancestors have been doing this for centuries.

(UR Annex 59, Part E, pp. 3-4.)

481. Thus, prior to regulatory liberalisation, production and export figures would have been relatively equivalent, but after liberalisation there was a gap between production and export figures because export traders no longer had reason to avoid reporting the actual level of their activity. By contrast, many producers, especially smaller ones, continued their custom of not reporting their production.

482. Notably, the First UN Panel Report confirms that any “discrepancy” between production and exports cannot confidently be attributed to exploitation of the DRC’s resources. Although the Panel at one point says that economic data provided “confirmation” of illegal exploitation in the Congo (DRCR Annex 69, Heading “F”), the actual text of the Report states only that the gap between production and export for Uganda “could” originate from exploitation, and further acknowledges that Uganda’s export figures for gold have “consistently” been greater than production. (*Ibid.*, paras. 96, 97.) Indeed, the Panel’s own figures show that the so-called gap between production and export existed even for the period between 1994 and 1997, long before the UPDF forces went to Congo. (*Ibid.*, Table 1, p. 20.)

483. With respect to diamond production and export, the First UN Panel claims that it developed figures from “several third party sources,” but these data have not been made available to Uganda to make an informed response. (DRCR Annex 69, para. 98.) The DRC, in turn, simply relies on the unsubstantiated allegations of the First UN Panel Report without proffering any evidence on the issue. In any event, the

First UN Panel Report itself explains why so-called third-party sources almost certainly presented incorrect figures which cannot be relied on as evidence of actual Ugandan diamond exports. The Report states that:

However, [diamond export information] is not well captured in the statistics because of the loose regulations governing the free zone areas. These regulations permit diamonds originating in *any* country to be repackaged, and then to be sold from *any* country as diamonds from a country of origin that is not necessarily the one mentioned in the statistics.

(*Ibid.*, para. 99; emphasis added.)

484. The First UN Panel Report notes the increase in Uganda's exports of niobium (coltan) in the late 1990s. (DRCR Annex 69, para. 101.) With the new use of coltan in cell phones in the 1990s, the prices and demand for the mineral shot up. These higher prices made the production of this mineral profitable, explaining the increasing exports of the mineral in the 1990s. The increased demand for coltan coincided with the Congo conflict but has nothing to do with it. *Post hoc* does not prove *propter hoc*.

485. Moreover, the mere transit of goods from eastern Congo through Uganda does not demonstrate any form of looting or illegal exploitation on the part of Uganda. As explained at length above, eastern Congo was unable to import or export goods through Kinshasa because road and railway infrastructure was non-existent while river access was precluded by the war between August 1998 and July 2002, whereas transit continued to be possible through Uganda, as has long been the case. Prohibiting such transit would have strangled the populations of eastern Congo, and Uganda properly did not take such action. (*Supra*, paras. 442-48.)

(5) *Allegations of Uganda’s purported “control” of business in eastern Congo prove nothing, other than the fact that Uganda did not “loot” that area*

486. The DRC makes the sweeping assertion that “[l]’armée ougandaise a assis un véritable contrôle sur l’ensemble du système économique et commercial des zones occupées, en violation flagrante de la souveraineté de la République Démocratique du Congo.”¹⁰¹ (DRCR, para. 4.25.) The DRC deserves credit for her florid rhetoric, but not for the care with which she has read her source documents. The only “fact” which is provided in *any* of the three UN Panel Reports on which the DRC relies is that “the Panel of Experts noted that the consumer goods and other merchandise found in Gbadolite and Bunia originated mostly from Uganda.” (*Ibid.*, quoting DRCR Annex 69, para. 64; *see also ibid.*, para. 4.26 (fuel, beer, salt, sugar, soap, clothing).) Indeed, the fact that the First UN Panel observed consumer goods and other merchandise which originated in Uganda demonstrates that the alleged “looting” was not occurring. The presence of Ugandan consumer goods proves the existence of bilateral cross-border trade which provided needed and wanted goods for the benefit of the population of the so-called “occupied areas.”¹⁰² If the DRC’s allegations of “looting” were true, there would have been no *trade*. Goods would have flowed in only *one* direction, toward Uganda, with nothing returning to eastern Congo.

487. The DRC also alleges the “imposition on traders of prices and conditions fixed by Ugandan forces.” (DRCR, para. 4.26.) The source for this is, again, the discredited First UN Panel Report. In any event, the Report provides no factual

¹⁰¹ “[t]he Ugandan army has exerted real control on the entire commercial and trade system of the occupied areas, thus glaringly violating the sovereignty of the Democratic Republic of Congo.”

¹⁰² As demonstrated in Chapter II (*see supra*, paras. 170-74, 204-10; *see also supra*, para. 407), Uganda did not “occupy” the DRC. To the contrary, eastern and northeastern Congo were under the *de facto* administrative control of the MLC and the RCD in their respective zones of operation. The Congolese rebels’ *de facto* governmental structures were recognised by the Lusaka Agreement in July 1999. (*Ibid.*)

support -- even of a hearsay nature -- for the allegation that “Ugandan forces” imposed “prices and conditions” on traders. Rather, the Report states that one farmer, again unidentified, purportedly stated that he was dependent on “coffee dealers” for the supply of bags imposed by the “coffee collectors (buyers),” and that failure to use these bags resulted in a reduction (of unstated amount) in the coffee price. There is no mention of any price fixing, or involvement by “Ugandan forces” in these transactions, or even of Ugandan (as opposed to Congolese or other) coffee dealers. (DRCR Annex 69, para. 65.)

488. Similarly, the DRC asserts that “Ugandan forces” appointed loyalists to civil administrative positions. Only one example is given, the confirmation of Mrs. Adele Lotsove’s assumption of the office of Vice Governor of Ituri Province in 1999. (*Ibid.*) However, the UN Panel Report on which the DRC relies states that Mrs. Lotsove was “a Congolese *who had already been employed by the Mobutu and Kabila administrations.*” (DRCR Annex 69, para. 71; emphasis added.) Thus, the UN Panel Report by its own terms demonstrates that Ugandan forces, rather than hand-picking a compliant loyalist, confirmed the appointment of an experienced local administrator without regard to the fact that she had served previous Congolese Governments that were hostile to Uganda.

489. Moreover, contrary to what the DRC and the First UN Panel Report claim, Mrs. Lotsove testified under oath that she was initially recruited for the office of Vice Governor by the Rwandan army, not the UPRDF.¹⁰³ Further, Brigadier Gen.

¹⁰³ Mrs. Lotsove testified before the Porter Commission, under cross-examination, that it was Rwandan officers who, after consulting widely among the local population, approached her and asked her to take up the position of Vice-Governor. She was asked to take up this position because of her previous experience and qualifications:

Miss Adele [Lotsove] Mugisa:

So we had to find people to talk to, we had to find political authorities to take charge. And the group which took over said that; this time we would like to have a woman leader. So they went around the people in Kisangani and made the necessary

consultations, so the people gave in a number of names and finally they said that the woman who can do that here in Kisangani is myself. And then I was contacted by Rwandan officers. Several times they refused to send cars to fetch me where I was, and then finally they got me to work for them. So I went to see an officer and I discussed with that officer and then I responded to all the questions he asked me. And he told me that he wanted me to be in the administrative team which he wanted to set up. After examining this question / after looking at it I said; why shouldn't I take this position. And I told them that I want to be one of the Vice Governors, they then told me that you will be the first Vice Governor. That is to say that there were two gentlemen there was the governor then me as the first Vice Governor and another vice governor. And we were presented to the people of Kisangani in September 1998 and we began to work.

Asst. Lead Counsel:

But the people who approached you earlier to which organization did they belong?

Miss Adele Mugisa:

They were Rwandan army officers. We began to work and in February...[o]f the next year i.e. 1999 we were sworn in, in Goma.

Justice Porter:

At that time September 1998 where was the UPDF?

Miss Adele Mugisa:

When the war reached Kisangani the first army men we saw in Kisangani were Rwandans. The Ugandans were also there but they were a bit far in the forest at about 17 km away along the international airport of Bangoka. But it is not Ugandans who contacted me, I was contacted by Rwandan officers....

(UR Annex 78, pp. 4-5.)

assumption of office in order to forestall a dangerous political and administrative vacuum in the region. (UR Annex 60, Part B, p. 12.) As the terms of the letter sent by Brigadier Gen. Kazini to Mrs. Lotsove make clear, he expected her to take charge of the economy of the region for the benefit of the local population, with revenues to be directed to development of the infrastructure in the region. Moreover, contrary to the claims that the UPDF wanted to establish a puppet administration under her, the letter expressly provided that the UPDF would be involved only in the provision of security for her, and then only for a maximum period of two months:

Security

...On assumption of your new office, with the help of UPDF in both Bunia and Isiro, embark on the following:

- Establish the number of Congolese military and civil police forces with a view to putting in place welfare programmes to cater for them;
- Have them re-organized and put in coherent formations;
- Tackle their welfare problems i.e. food, medicine, uniforms, etc using limited revenue collections;
- Subject them to a minimum politicisation programme and have them deployed to maintain law and order in the area. They must be educated to know that the gun is for protecting people and their property - after all it was bought by the people.

Economy

The economy of the DRC is in a total mess. This is due to its gross mismanagement by the leadership referred to above. The vital

economic sectors i.e. agriculture, trade and commerce, mining, banking, fishing, transport and communications, power generation, timber production, industrial processing were hijacked by corrupt leaders to further their selfish interests at the expense of national development. To this end, the DRC is one of the countries with the highest mortality rates, illiteracy at around 75%, very poor living conditions, high unemployment rates, hyper-inflation, etc. This state of affairs cannot produce a healthy population.

On assumption of your office, try to do the following:

.....

- Reorganise the revenue collection system - starting with border points and town towns. The system should focus on accountability;
- Revenue collected must be injected in security, social and economic infrastructures;
- Reorganise the mining sector with powers of concession. Discuss with prospective mining firms with a view to raising revenue, providing employment, and provision of other social services aimed at improving the quality of life in the area;
- Revitalise the agricultural sector with emphasis on improving production;
- Create a suitable environment for investment, and cross-border trade.

By a copy of this letter, Lt. Col. Sula Semakula in Isiro and Capt. Kyakabale in Bunia, are directed to work out a

comprehensive security arrangement for you using UPDF soldiers at the beginning. The Congolese military and civil police, after reorganisation, should then relieve UPDF of these internal security tasks. Reorganisation must not exceed two months.

(UR Annex 35, p. 3.)

490. The DRC cites no other specific examples of Ugandan intervention in local administration in eastern Congo. In fact, Brigadier Gen. Kazini's actions with respect to Mrs. Lotsove were unique, and took place in a context where local government had broken down and the public order had collapsed. Nevertheless, for his interference in local administration contrary to the strict orders of the Ugandan Government, Brigadier Gen. Kazini was sternly reprimanded by his Commander in Chief, President Museveni. (See UR Annex 65, Part C, pp. 23-24; UR Annex 68, pp. 26-27.)

491. Further allegations by the DRC that Mrs. Lotsove transferred (unspecified as to when or how) some "funds" (unspecified in nature or amount) to some "Ugandan authorities" (unidentified) are based on "information gathered" (unspecified as to nature or source). (DRCR, para. 4.27.) The *Reply* succeeds only in adding another baseless slur to the DRC's endless list.

492. Allegations that unnamed "Ugandan authorities" "embezzl[ed] taxes" and "made a lot of money" (DRCR, para. 4.28) are equally unsupported. In fact, the documents on which the DRC relies actually contradict any assertion that "Ugandan authorities" were embezzling taxes. The so-called *Protocol of Agreement between the RCD and the MLC of 30th July 1999* (DRCR Annex 79) makes clear that any tax collections were to be directed to an Economic Commission which was to "watch over the application of the principal of equitable sharing of the public resources throughout the entire liberated territory" (*ibid.*, Art. 5) in order to, *inter alia*, "re-establish the public money network throughout the entire liberated region" and "oversee the adherence to the financial and budgetary law" (*ibid.*, Art. 6),

as well as to provide for “the payment for bank services” and for the “day-to-day expenses of the local administration.” (*Ibid.*, Art. 7.) There is not a single word, or even a suggestion, that taxes were “embezzled” by “Ugandan authorities.” As recognised and ratified in the Lusaka Agreement, which predated by several weeks, the *Protocol* on which the DRC relies, the rebels were the *de facto* government in the areas they controlled, and the responsibility of administration necessarily brought them the right to levy taxes.

(6) *Allegations of trade in protected animal species are without merit*

493. The DRC also states that the “involvement of the UPDF” in the hunting of protected species “cannot be doubted.” This was supposedly “confirmed” by “fact[s]” that, yet again, appear to be concocted. (DRCR, para. 4.32.) The DRC simply parrots allegations in the First UN Panel Report that “in August 2000, UPDF Colonel Mugeni and a crew of his soldiers were discovered with 800 kg of elephant tusks in their car near Garamba Park” and that the “Government of Uganda received detailed notification of this incident.” (DRCR Annex 69, para. 62.) As is its practice, the First UN Panel Report provides no source for the allegations, and also fails to indicate who supposedly “discovered” Colonel Mugeni with a load of tusks. The alleged incident was denied by Colonel Mugeni under oath and, even if one chooses not to credit Colonel Mugeni, an officer of the Uganda Wildlife Authority who would have received the purported “detailed notification” of the incident, had it occurred, testified under oath that the Authority had received no such report. (UR Annex 68, pp. 39-40.)

494. The same is true of the allegation that “a consignment of tusks” was impounded by the RCD-ML and later “sent to Kampala, following a lot of pressure from Uganda.” (DRCR, para. 4.32.) The First UN Panel Report supplies no details of the source of these allegations, nor does it even suggest from whom the tusks were impounded, or who exerted “pressure.” Officers from the Uganda Wildlife Authority, who would have been informed of this alleged incident (if it had actually

occurred), testified under oath that they had received no such information. (UR Annex 68, p. 40.)

H. There Is No Evidence That Uganda Failed To Act Against Illegal Activity

495. The DRC would hold the Ugandan Government responsible based on the allegation that the “*principaux protagonistes ougandais du pillage des ressources naturelles...n’ont fait l’objet d’aucune sanction ni autre mesure visant à mettre fin à leurs activités illégales en RDC.*”¹⁰⁴ (DRCR, para. 4.36.) The flaws in this argument are obvious. The DRC has failed to establish that “looting” by the “protagonists” was proved to the Ugandan Government, which then failed to act. In fact, the DRC has failed to prove even now that the named “protagonists” were involved in the “looting” of natural resources in the first place.

496. As discussed above, allegations of “looting” by Brig. Gen. Kazini are unsupported by any evidence and are, in fact, contradicted by the evidence. (*Supra*, paras. 460-64.) Insofar as the Porter Commission is alleged to have “expressed surprise” at the “weak punishment” received by Brig. Gen. Kazini (DRCR, para. 4.36), the DRC ignores the reason why he was punished. Brig. Gen. Kazini was not punished because he was found to have engaged in “looting” as asserted by the DRC, for that was not the case, but rather because he “created a new Province in defiance of organised opposition, leaving yet more disgruntled Congolese, and in defiance of the express command of his Commander in Chief.” (DRCR, para. 4.36.) His punishment was thus proportionate to the offense.

497. Similarly, the allegations of “looting” directed against General Salim Saleh and his wife Jovia Akandwanaho, which rested primarily on their alleged involvement in the “Victoria Group” and “Trinity Company,” are contradicted by the evidence. (*Supra*, paras. 403-05.) Finally, the allegation of

¹⁰⁴ “main Ugandan protagonists in the looting of the natural resources... were not punished in any way nor were any measures taken to end their illegal activities in the DRC.”

“looting” against the fourth so-called “protagonist,” Colonel Kahinda Otafiire, is actually rebutted by the report on which the DRC relies. According to that report, Colonel Otafiire *purchased* timber, paying in money and iron sheets. (DRCR Annex 14, *The Monitor*, 29 November 2001.) A bilateral agreement with a trader, which is all that occurred, according to the report relied on by the DRC, is not “looting.” Whether or not Colonel Otafiire violated orders not to become involved in commercial activities in Congo is, again, a matter for Colonel Otafiire and his superiors to resolve. The allegations against Colonel Otafiire do not even remotely constitute an incident of “looting.”

498. The DRC’s efforts to find President Museveni responsible for the alleged “illegal exploitation of the DRC’s wealth” are simply slurs devoid of evidentiary support. (DRCR, para. 4.37.) The DRC relies on the discredited First UN Panel Report, which offers no basis for any allegations against President Museveni. (*See ibid.*) The only specific allegations mentioning President Museveni were that he failed to act after receiving a report of embezzlement by Mr. Mbusa Nyamwisi and by Mr. Tibasima, after being “informed” of exploitation by the MLC and RCD-ML, and after receiving a report denouncing the “collusion between Trinity Group and...the impact on the collection of customs duties.” (*Ibid.*) In addition, it is alleged that General Salim Saleh and his wife, shareholders in “Victoria” and “Trinity,” managed to “get away” with criminal activities, though this allegation does not mention President Museveni. (*Ibid.*)

499. As set forth above, the UN Panel’s allegations with respect to Victoria and Trinity are contradicted by the evidence of record. (*Supra*, paras. 400-05.) If the DRC cannot even now muster contrary evidence, it is ludicrous to assert that some form of punishment should have been meted out against General Saleh and his wife.

500. The “reports” and “information” supposedly received by President Museveni with regard to Messrs. Nyamwisi and Tibasima and the MCL and RCD-ML are not identified. In addition, even if such “reports” were made to President

Museveni, there would have been no jurisdiction for him to take action against Congolese nationals and unspecified persons in Congolese rebel groups -- even if the allegations made against those persons were true. The Lusaka Agreement confirmed that the MLC and RCD Congolese rebel organisations, and not Uganda and certainly not President Museveni, were responsible for administrative control of the areas of the DRC under their military control. The Lusaka Agreement of July 1999 had been in place for months by the time the supposed "reports" were made to President Museveni (December 1999 and February 2000). (DRCR, para. 4.37.)

501. The DRC also implies that President Museveni, knowing that Ugandan soldiers were engaging in commercial activity in the DRC, sent a radio message forbidding such activity in ambiguous terms that were interpreted by Ugandan soldiers as permission to do business in collaboration with Ugandan companies. The truth of the matter, however, is that the Presidential message was given following unverified allegations that some unnamed Ugandan officials were engaged in business in the eastern Congo. (*See, e.g.*, UR Annex 26.) By acting preemptively in this manner, Uganda went far beyond any duty she may have had.

502. The actual text of President Museveni's message provides the best evidence that he was unequivocal in stating that *no* commercial activity by Ugandan troops or officials would be tolerated:

1. Ensure that there is *no* officer or man of our forces in Congo who engages in business.
2. Also report to me *any other* public servant whether currently based in Congo or not who tries to engage in business.
3. However, *other* Ugandan businessmen (who are *not* soldiers or public servants, including all politicians or their families), should, given the fluid security situation be

assisted if necessary, to do business there in order to alleviate the acute needs of the population and also to establish links for the future.

(UR Annex 31, emphasis added.) President Museveni made clear that his purpose was to eliminate any feeling that Ugandan forces were in the eastern Congo in order to loot rather than to defend Uganda's security interests. (*Ibid.*)

503. Contrary to the DRC's rhetoric, there was nothing "ambiguous" about President Museveni's instructions. They were crystal clear in their prohibition of business activities by Ugandan soldiers and public servants. Commercial activity by private business people was permitted in order to make essential consumer goods accessible to the local population, averting an escalation of the humanitarian crisis in eastern Congo. (*Ibid.*; *see also supra*, paras. 442-48.)

I. The DRC Fails To Resuscitate The First United Nations Panel Report And To Impugn The Porter Commission

504. The DRC, recognising that her allegations of "exploitation" rest almost exclusively on the unsupported assertions of the First UN Panel Report, attempts unsuccessfully to breathe life into that Report. The DRC does not -- because she cannot -- respond to specific criticisms of the Report (including Security Council criticisms that the Report was lacking in evidentiary support). Rather than dealing substantively with the failures of the Report, the DRC engages in name calling, denigrating criticisms of the report as "insults" and "libel" (DRCR, para. 4.44) and ineffectually trying to validate the report through the Report's own self-serving praise of itself. (*Ibid.*, para. 4.45.) What is inescapable, however, is that the First UN Panel Report on which the DRC's case rests was deemed inadequate by a plethora of States -- *including the DRC herself* -- who emphasised the failure of the Report to distinguish between reliable evidence and unreliable hearsay.

505. Even the Second UN Panel Report recognised the inadequacies of the First Report, and acknowledged that those inadequacies persisted: “The Panel tried its best to address the complaints and reactions as a consequence of the [first] report....” (*Supra*, para. 346.) In the end, the DRC’s arguments are reduced to a whimper: the DRC contends that it is “obvious” that a Statement by the President of the Security Council “was aimed at Uganda” despite the fact that there was *no* mention of Uganda (or, indeed, of any other State). (DRCR, para. 4.49; *see* DRCR Annex 71.)

506. The DRC also asserts that the interim report of the Porter Commission either “confirm[ed]” or failed to rebut the allegations of the First UN Panel Report. (DRCR, para. 4.50-4.58.) Only a few examples are given, and these directly contradict the DRC’s assertions.

507. It is said that the Porter Commission found that “coffee owned by Jean-Pierre Bemba” was on two occasions carried on military aircraft. (*Ibid.*, para. 4.53.) The DRC leaps from this finding to the broad assertion that “*l’UPDF transportait par avions militaires le produit du pillage des ressources*”¹⁰⁵ (DRCR, para. 4.53), despite the fact that there is no mention of any other goods being transported, the fact that Mr. Bemba was not an officer in the UPDF, and the fact that there is no evidence, or even suggestion, that the coffee was “looted.”

508. The DRC next tries to explain away the total lack of evidence to support allegations that Ugandan authorities embezzled taxes (indeed, as noted above, the documents which the DRC cited actually *contradicted* the DRC’s allegations). (*Supra*, para. 492.) The DRC does this by resorting to blatant speculation, hypothesising about “*la possibilité de l’existence de transferts de fonds aux officiers de l’UPDF présents sur le terrain ou de versements aux autorités ougandaises qui auraient été faits de manière clandestine.*”¹⁰⁶ (DRCR, para. 4.54; emphasis added.) The DRC, yet again, ignores the

¹⁰⁵ “the UPDF used to transport the looted resources aboard military planes”

¹⁰⁶ “the *possibility* of funds being remitted to the local UPDF officers and to the Ugandan authorities in a clandestine manner.”

distinction between evidence and rhetoric, just as she ignores the distinction between fact and speculation.

509. The DRC argues against the conclusion of the Porter Commission that the “Victoria Group” does not exist, arguing that the absence of any record *might* be due to the fact that the “Ugandan registry of companies was very poorly managed.” (DRCR, para. 4.55.) The salient fact is that there actually is no “Victoria Group,” and while there is an entity named “Victoria Diamond,” the articles of organisation of that company contradict the assertions of the UN Panels regarding the company’s ownership. (*Supra*, para. 401.) Further, Victoria Diamond has licences to engage in the business of trading diamonds in the DRC issued by the Ministry of Finance. (*Ibid.*) Yet again, in her final gasping effort to attack the Porter Commission, the DRC ignores the distinction between evidence and speculation.

J. The DRC Fails To Understand The Governing Law

510. In approaching the legal principles allegedly violated by Uganda, the Respondent State has a problem of general character. This stems from the fact that Uganda denies the allegations and, further, considers that the Claimant State has not satisfied the applicable standard of proof.

511. It must follow that there is not much value in a detailed examination by Uganda of the quality and relevance of the legal principles set forth by the DRC in paragraphs 4.59 to 4.84 of the *Reply*.

512. As a matter of principle Uganda does not necessarily reject all the propositions of law offered by the DRC, though Uganda does reject the mode in which the DRC seeks to apply the legal principles.

513. In any event Uganda reserves her position on the relevance and accuracy of the legal principles invoked by the DRC. It is clear that the exposition of legal principles contains manifest confusions and anomalies. The invocation of the obligation of due diligence in relation to the alleged facts is an

example of confusion. (DRCR, paras. 4.71-4.81.) The concept of due diligence relates to the position of aliens and their property within the territory of a respondent State. It is wholly inapplicable to the circumstances prevailing in the DRC.

514. Even if one applied the normal standards of human rights, in accordance with general international law, Uganda's conduct was entirely compatible with those standards. Uganda, on her part, has made all efforts to redress the alleged wrongs, once known, including appointing two Commissions to determine the truthfulness of the allegations.¹⁰⁷

515. With respect to paragraph 4.38 of the *Reply*, Uganda does not accept that there was an armed conflict for the purposes of the Fourth Geneva Convention.

516. With respect to paragraph 4.84 of the *Reply*, Uganda is bound to point out that these claims based upon the Chicago Convention on International Civil Aviation were not included in the Application submitted by the DRC dated 23 June 1999. The DRC has not sought permission to amend the Application and the right to amend the Application was not reserved. In any case, the claims in question would not necessarily satisfy the criteria of jurisdiction, set forth in the *Nicaragua* case. (I.C.J. Reports 1984, p. 426, para. 80; *see also* the *Application of the Genocide Convention* (Further Provisional Measures) case, *ibid.*, 1993, p. 338, para. 28.)

517. In the light of the contents of the *Reply*, Uganda finds it necessary to repeat the conclusion reached in the *Counter-Memorial* that the DRC has not produced any reliable evidence of the responsibility of Uganda for the alleged looting of natural resources. (UCM, 144-52.) In this connection Uganda confirms the substance of Chapters VII and VIII of the *Counter-Memorial* relating to the major inadequacies of the *Memorial* in the matters of proof. These inadequacies are particularly

¹⁰⁷ Apart from the Porter Commission of Judicial Inquiry, an independent judicial tribunal which was established in June 2001, Uganda had earlier appointed a Joint Ministerial Committee to consider similar allegations and to devise policy and guidelines promptly after receipt of the first allegations.

marked in the sphere of the allegations concerning natural resources. (UCM, paras. 178-83.)

518. Uganda reiterates the pervasive deficiencies in the methods of the UN Panels, and in particular the methods employed in the creation of the First UN Panel Report on which DRC primarily relies. (*Supra*, paras. 399-405.)

519. By way of conclusion Uganda reaffirms her position that the DRC has not satisfied the standard of proof required in establishing state responsibility in relation to the claims concerning natural resources. As the Court expressed the position in the *Corfu Channel* case (Merits) in reaction to the second alternative argument of the United Kingdom to the effect that the minefield was laid with the connivance of the Albanian Government:

A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here.

(I.C.J. Reports, 1949, p. 17.)

520. Having examined the main question, which is the inadequacy of the proof of imputability offered by the DRC in both her pleadings, it is necessary to turn to a subsidiary aspect of the legal arguments presented in the *Reply*. This is the assertion that Uganda was “in control” of large areas of the DRC, even when the *de facto* administering authorities were Congolese insurgents. (DRCR, paras. 4.74-4.81.) The DRC avoids any legal classification of the nature of this “control.”

521. In response Uganda maintains that her presence in the DRC was governed by the purposes of self-defence, insofar as such a presence was not justified by the consent of the DRC. Such purposes did not involve a so-called occupation regime of any character. (*See supra*, Ch. II.) In this context Uganda denies that the principles stated by the Court in the *Namibia* Advisory Opinion are applicable in the circumstances. (DRCR, paras. 4.74-4.75.) In saying this, Uganda does not seek to deny that the principles are valid in appropriate contexts.

522. Uganda accepts that on specific occasions she assisted the Congolese rebels in resolving local problems. In such cases, the applicable principle would appear to be contained in Article 9 of the Articles adopted by the International Law Commission in 2001:

Article 9. Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered as an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

CHAPTER V

RESPONSE TO THE ALLEGATIONS OF HUMAN RIGHTS VIOLATIONS

523. This Chapter responds to the factual allegations in Chapter V of the DRC's *Reply* concerning alleged human rights violations.

A. **The DRC Proceeds From The Erroneous Premise That Uganda Was An Occupying State And Fails To Satisfy Her Burden Of Proof.**

(1) *Uganda was not an "occupying State"*

524. The DRC alleges that Uganda is "internationally responsible" for human rights violations in eastern Congo because Uganda is purportedly an "occupying State," and therefore "responsible," since "*le droit international fait peser un certain nombre d'obligations sur les Etats occupants, que leur imposent de veiller à la protection des populations civiles dans les zones soumises à leur contrôle.*"¹⁰⁸ (DRCR, para. 5.05.) With this argument the DRC hopes to avoid having to prove -- because she is unable to do so -- that any specific human rights violations were in fact committed by Ugandan troops.

525. As already demonstrated in Chapter II, the premise that Uganda is responsible for human rights violations because she is an "occupying State" is manifestly erroneous in light of both the situation on the ground and the Lusaka Agreement. (*Supra*, paras. 170-74, 198, 201, 204-210; *see also* para. 407.) To summarise, Ugandan forces maintained a limited presence in eastern Congo only in the border regions where anti-Uganda insurgents operated and at strategic airfields within striking distance of Uganda. The troops were too few and too spread out to maintain an "occupation" and neither administrated nor

¹⁰⁸ "international law imposes a number of obligations on occupying States, such as the protection of civilians in the areas under their control."

sought to administer the areas in which they operated. Local administration in these areas was provided by the MLC and RCD Congolese rebel organisations which constituted *de facto* governments. These were recognised as such in the Lusaka Agreement. Because Uganda is not an “occupying State,” she cannot be held responsible for events in the DRC simply on that basis, without evidence that troops or other persons under her control actually committed specific unlawful acts.

526. The DRC’s false premise that Uganda “occupied” eastern Congo has led the DRC to avoid offering proof that UPDF troops were actually responsible for the various alleged wrongs. The DRC’s mistaken premise has also caused the DRC to attribute alleged violations of human rights standards to Uganda even when there was *admittedly* no factual evidence suggesting a link between the UPDF and the alleged violations. (See DRCR, para. 5.05: (“...*même si les exactions en cause ne sont pas le fait direct des troupes ougandaises, la responsabilité de l’Ouganda ne s’en trouve pas moins engagée, dès lors que le droit international fait peser un certain nombre d’obligations sur les Etats occupants...*”); emphasis added.)¹⁰⁹

(2) *The DRC has not met her burden of proof.*

527. The DRC implicitly acknowledges that she has not met her burden of proof, contending that she has been hampered in “*apporter des preuves des exactions commises par les troupes ougandaises ou avec leur complicité, au moins passive.*”¹¹⁰ (DRCR, para. 5.03.) This last sentence unwittingly crystallises the two principal inadequacies of the *Reply*. First, the DRC explicitly admits her failure of proof. Second, the DRC reiterates the erroneous belief that guilt by virtue of “passive complicity” can be imposed on Uganda as an “occupying State.”

¹⁰⁹ “...even though the acts in question *were not directly committed by the Ugandan troops*, Uganda is internationally responsible, since international law imposes a number of obligations on occupying States....”

¹¹⁰ “presenting proof of the violent acts committed by the Ugandan troops or with their passive complicity.”

528. As discussed in more detail below, the DRC thus reduces herself to making sweeping allegations in a most offhand manner, unsupported and unsupportable by any evidence. Where support is supposedly offered, the DRC's purported "proof" is either internally inconsistent or unreliable and unverifiable hearsay (and double hearsay) from third-party sources that remain unidentified in almost all cases. There are at least four fundamental problems with the DRC's "proof" of humanitarian violations.

529. First, many of the publications on which the DRC relies merely assert wrongs done to civilians and do not single out Uganda as the blameworthy party. At the very least, it is impossible to determine from the text of these publications whether it is Ugandan, the Rwandan, the various rebel, or even the DRC-backed irregular forces that were allegedly responsible. The DRC is therefore unjustified in placing the blame for wrongs on Uganda on the basis of these publications.

530. Second, the publications cited in the *Reply* were not compiled for the purpose of imputing responsibility or of determining culpability for the violation of human rights standards. These publications, being either human rights reports or, in one case, an historic Record of Ceasefire, had the objective of establishing the plight of civilians as a result of hostilities. The publications were not designed to meet the high standards required to assign culpability to a State with respect to violations of international law. When the DRC seeks to assign blame, she is therefore using the publications out of context.

531. Third, given the objectives of these publications and the qualifications of their researchers, their authors never had the mandate, the resources or the capability to authoritatively assign responsibility. Most critically, the authors of the publications cited throughout Chapters IV and V of the *Reply* did not possess relevant regional, military and security expertise to determine which parties engaged in activities, to investigate and determine responsibility, or even to distinguish among the parties. The various forces operating in eastern Congo shared characteristics, including language and uniforms, which made it impossible for an inexperienced observer, without access to military

information, to distinguish among them. Thus the publications cited by the DRC cannot be used to support determinations regarding alleged violations of human rights standards.

532. Fourth, certain of the publications were produced by non-governmental organisations that are indisputably partisan and that pursue a particular political objective rather than seek accurately to establish facts. It is noteworthy that the DRC bases almost all her allegations in Chapter V on the publication produced by ASADHO in collaboration with *Agir ensemble pour les droits de l'homme*. (DRCR Annex 93.) This publication lacks credibility for a number of reasons.

533. First, ASADHO is a politically motivated, partisan Congolese organisation that cannot be relied on to give objective reports or analyses. The political motivation of the publication is made clear in the preamble where the Chairman of ASADHO boldly writes:

*Il faut obtenir le retrait de l'armée
ougandaise dont rien ne justifie la présence
en terre congolaise.*¹¹¹

(*Ibid.*, p. 2.)

534. As can be discerned from this quotation, ASADHO's primary purpose is convincing the reader that Uganda's presence in Congo is unjustified in order to exert pressure for withdrawal. Indeed, the publication is melodramatically entitled "*L'Ouganda sacrifie la population civile congolaise.*"¹¹²

535. There is no evidence at all that supports any of the allegations that ASADHO puts forward, leading to the inevitable conclusion that responsibility is improperly assigned, or that accounts are exaggerated or entirely fictitious. Alleged witnesses are never identified and nothing in the publication

¹¹¹ "A withdrawal of the Ugandan troops, whose presence in Congo cannot be justified at all, must be secured."

¹¹² "Uganda Is Sacrificing Congolese Civilians."

suggests how the information relied on was obtained or how its contents can be verified. Indeed, in its preface the publication invites doubts about its own authenticity:

*Notre propos n'est pas de faire œuvre d'historiens même si chaque événement signalé et chaque nom cité ont fait l'objet des vérifications indispensables. Notre volonté est de lancer un cri d'alerte et un appel au secours.*¹¹³

(*Ibid.*)

536. Despite the claim that the facts have been subjected to “verifications,” there is no account of how such purported verification (if any) was carried out, or by whom. Given the self-admitted political motivation of the publication, any so-called verification process is suspect at best. In any event, the publication undercuts its own utility as a basis for assigning legally relevant culpability by conceding that its sole purpose was not to “write a history book,” but rather to “sound a warning” and “appeal for help.” The authors of this publication have effectively conceded that the publication cannot meet the legal standards for establishing culpability.

537. The context of the ASADHO publication provides further reason to doubt its accuracy. The publication describes unknown UPDF soldiers supposedly running amok and engaging in every imaginable civil and criminal wrong, as though UPDF soldiers controlled all aspects of life in the region. The publication neglects the fact that at no point was the UPDF in control or occupation of *any* part of Congo, including those parts covered in the ASADHO publication. As already demonstrated in Chapter II of this *Reply*, the notion of the UPDF’s “occupation” of eastern Congo is a myth propagated by the DRC. The truth is that Uganda’s presence in the DRC was limited -- tactically, geographically and

¹¹³ “We do not intend to write a history book even though each incident and name has been subjected to the necessary verification. We would simply like to sound a warning and make an appeal for help.”

numerically -- and was designed only to secure key strategic sites to address Uganda's legitimate security concerns. (*See supra*, paras. 170-74.) In all the regions covered by the ASADHO publication, at all times, the civil administration was under the leadership of either MLC or RCD forces, who were, as well, in charge of the maintenance of public order in those areas. (*See supra*, paras. 198, 201, 204-10.) Thus, because the wrongs alleged in the ASADHO publication are of a sort that presuppose actual control of the affected area, it is most likely that any alleged wrongs were committed by forces other than the UPDF.

538. Last but not least, the allegations of particular incidents in the ASADHO publication (and in the *Reply*) commonly attribute wrongs to "an unidentified Ugandan soldier," a "Ugandan soldier," or "Ugandan troops," without any identification of the soldiers or evidence to explain how those reporting knew that the alleged perpetrators were, in fact, Ugandan soldiers. Moreover, despite the detail with which the purported wrongs are recounted, there is no indication of the UPDF unit which was supposedly involved, the size of the unit, the number of soldiers, the ranks of the soldiers, or any other identifying information which could verify the unfounded allegations that the actors were Ugandan troops, rather than other parties. ASADHO and the DRC simply invite the Court to believe allegations of massacres and other human rights violations without any credible verification.

539. The Grand-Nord Civil Society message (DRCR Annex 95) is, like the ASADHO publication, a partisan rather than objective document. Grand-Nord starts its message by stating that its purpose is to show "*la vision de la population du GRAND NORD à l'égard du Gouvernement ougandais*"¹¹⁴ (*ibid.*, p.1) and then sets out the erroneous premise that Uganda intervened in Congo in 1996:

*Un regard rétrospectif révèle que
l'Ouganda est intervenu à deux reprises en*

¹¹⁴ "the way the people of GRAND NORD perceive the Government of Uganda"

*République Démocratique du Congo. Une première fois en 1996 avec la guerre dite de libération menée par l'AFDL, avec à la tête, Monsieur Laurent Désiré KABILA qui aboutit au départ de MOBUTU et à la prise du pouvoir par KABILA le 17 mai 1997.*¹¹⁵

(*Ibid.*)

540. As has already been demonstrated in Chapter II of this *Rejoinder*, Uganda did not participate in the so-called First Congo War. (*Supra*, paras. 115, 161-66; *see also* paras. 415-16.) To the extent that an erroneous premise provides the lens through which Grand-Nord interprets political events in eastern Congo, its whole approach is tainted. In any event, the opening words of the Grand-Nord publication clearly indicate that what follows is not an objective human rights report but a political document.

541. There are obvious connections between the two organisations on whose publications the DRC primarily relies to make its case, ASADHO and Grand-Nord. For example, Kambere Kayitambya Godefroid, the Chairman of ASADHO, is also a member and signatory of the Grand-Nord publication. (*See* DRCR Annex 96, p. 7.)

542. The following passage in the European Congo Network (REC) publication (DRCR Annex 98) likewise illustrates the flippant, unprofessional nature of the publications on which the DRC relies:

Visiblement, les attermolements de Bemba vis-à-vis des négociations inter-congolaises et du désengagement des lignes de front sont liés à la recherche de son enrichissement rapide et de la cupidité de ses parrains,

¹¹⁵ "A backward review reveals that Uganda has intervened twice in the affairs of the Democratic Republic of Congo. First, in 1996 during a war called a liberation war led by the AFDL, with Mr. Laurent Desiré Kabila as the Chairman and which led to the overthrow of Mobutu and the former taking power on May 17th 1997."

*officiers ougandais, et de la politique du ventre de ses ministres opportunistes dont le vagabondage agace le peuple.*¹¹⁶

(*Ibid.*, p. 8.)

543. Partisan statements and *ad hominem* attacks such as this indicate that the so-called human rights reports are not objective studies based on sound research. Rather, these publications are unmistakably political documents by groups with evident political agendas.

544. Uganda respectfully directs the Court's attention to the volume *Silence, On Meurt: Temoignages (Quiet, We Are Dying: Testimonies)* recently published by Médecins Sans Frontières (Doctors Without Borders) ("MSF"). Unlike the publications on which the DRC relies, which offer only unattributed accusations, this volume contains first-hand accounts of individuals who are clearly identified, and whose stories can therefore be verified or tested. The critical point is that *not one* of those first-hand testimonies implicated Uganda, or, indeed, even mentioned Uganda or Ugandan forces. Most of the brutality (war crimes and crimes against humanity) referred to in the book were committed by the FAC, the *Interahamwe*, and the RCD, with witnesses generally associating the RCD with Rwanda. Uganda's purpose is not to emphasise the culpability of the FAC and the DRC Government, but rather to point out the complete absence of *any* allegations against Uganda or the UPDF in the MSF's comprehensive compilation of testimonies. This non-partisan accumulation of first-party testimonies demonstrates that the DRC's sources are, in contrast, singularly biased and unreliable.

¹¹⁶ "Clearly Bemba's hesitations vis-à-vis the inter-Congolese negotiations and the disengagement are linked to his quick enrichment, the greed of his Ugandan officer godfathers and the politics of self-aggrandizement practised by his opportunistic, wandering ministers who annoy the people."

B. The Difficulty Of Distinguishing Among Various Armies And Belligerents

545. Researchers, victims and witnesses of the alleged human rights violations would have readily confused the various armies operating in eastern Congo, especially the RPA and the RCD rebel forces, with Ugandan forces. This is due to the commonalities of uniform, equipment and language of these armies. Referring to the possibility of this kind of confusion, the U.S. State Department, in its *DRC Country Report on Human Rights Practices for 1998*, stated that:

Although it often was difficult for victims and witnesses to distinguish RCD rebel forces from elements of the Rwandan army due to their close cooperation and commonalities of language and equipment, Rwandan army personnel also reportedly committed many serious human rights abuses, including extra-judicial killing, torture and rape.

(UR Annex 33, p. 3.)

546. The fact that authors would have confused different forces results from the fact that the RPA, the RCD rebels (both factions) and the UPDF wore virtually identical military uniforms, and had similar military structures. Members of each of the various forces also speak to each other in English, Swahili, or Kinyarwanda. This fact that members of the various forces wore military uniforms and used military equipment indistinguishable from each other was attested to by Brig. Nakabus Lakara, the Acting Chief of Staff of UPDF, under oath:

19. That the tanks used by the UPDF were manufactured in the former Soviet Union.

20. That tanks manufactured in the former Soviet Union were and are purchased and used by the armies of many African countries including Rwanda and Burundi.

21. That the tanks used by the UPDF are indistinguishable from similar tanks used by other armed forces in the region, and bear no distinguishing marks.

.....

23. That the uniforms worn by Ugandan troops deployed in the DRC were indistinguishable from, indeed were in many cases identical to (and came from the same factories as), the uniforms worn by other forces with a presence in the DRC, including those of Rwanda, the RCD and the MLC.

(UR Annex 107.)

547. Attributing wrongs to Ugandan soldiers is particularly suspect in view of the fact that the UPDF has always strenuously enforced military discipline. UPDF forces are subject to a strict Operational Code of Conduct which includes the following provisions:

A. Dealing with the Public

1. Never abuse, insult, shout at or beat any member of the public.
2. Never take anything in the form of money or property from any member of the public not even somebody's sweet bananas or sugar-cane on the ground that it is a mere sugar-cane without paying for the same.
3. Pay promptly for anything you take in cash.
4. Never kill any member of the public or any captured prisoners, as the guns should only be reserved for armed enemies or opponents.

5. Return anything you borrow from the public.

.....

B. 11. Offences

PART I

Category B

The punishment for the following offences shall be, the punishment in paragraph 10 (ii)(a) to (e) depending on the circumstances of each case:

.....

(g) corruption;

(h) embezzlement of Chama [Public] funds;

(i) theft of property;

(j) failure to report known and prescribed misbehavior of a fellow officer or fighter to authorities;

.....

(l) abusing, insulting, mistreating of mwananchi [citizens];

.....

(k) failure to report or hand over gifts from mwananchi [citizens]

PART III

12. The offence of undermining relationship with the civilian population shall include:

- (a) causing annoyance to the civilian population;
- (b) stealing civilian property or food;
- (c) trespassing on civilian property;
- (d) using threatening behavior on the civilian population;
- (e) failing to pay for goods purchased;
- (f) obtaining goods by false pretences.

(UR Annex 2.)

548. The UPDF thus expects its troops to be disciplined, and in particular places great emphasis on the relationship between the UPDF and civilian populations. The UPDF's Code of Conduct was rigorously enforced in eastern Congo, with soldiers who contravened the Code subject to the UPDF disciplinary process.¹¹⁷

549. The publications on which the DRC relies do not permit any reasoned verification of the accuracy of allegations attributing actions to "Ugandan soldiers," "the UPDF" or "Ugandan forces." Because the sources of the accusations are not identified, and because the actual contents of their statements are unreported, the basis (if any ever existed) for attributing actions to Uganda cannot be verified.

550. The confusion and inability to distinguish among the various forces operating in eastern Congo is compounded by the unhelpful generality with which accusations are made. The fact that allegations are made without indicating what factors were

¹¹⁷ Those punished included Lt. Okumu, Lt. Kisima and Capt. Kyakabale. (UR Annex 72, p. 27.) It should be noted that Uganda is among the few African countries that expressly subject their armed forces to parliamentary oversight: The UPDF is, constitutionally, under strict parliamentary oversight under Article 208 as read together with article 210 of the 1995 Uganda Constitution.

used to identify the alleged transgressors as members of UPDF, coupled with the fact that most of the allegations incorrectly presuppose that the UPDF was carrying out civil administrative functions, leads to the conclusion that no meaningful efforts were made to distinguish among the various armies and that the UPDF was erroneously identified. Because the publications relied on by the DRC fail to indicate how crucial distinctions were made among the various forces in the DRC, and because the UPDF is singularly well-disciplined, it is almost certain that alleged human rights violations now being blamed on Uganda were, in fact, committed by other armies that actually occupied and had police authority in the region.

C. **The Various Allegations Against Uganda Are Unsupported And False**

(1) *Claims that Ugandan forces deliberately killed civilians.*

551. Seeking to demonstrate that Ugandan troops murdered civilians, the DRC elevates the partisan ASADHO publication with its broad, unfounded allegations against unidentified “Ugandan troops” to prominence in the text of the *Reply*, while consigning other less-biased reports to passing mention in footnotes. Those footnoted reports, however, make clear how biased and unreliable the ASADHO publication actually is. For example, the DRC says that “facts were also reported” (“*ces faits sont également rapportés*”) in DRCR Annex 86, a U.S. State Department Report. (DRCR, para. 5.08, n.11.) The cited report, however, made clear that it was not reporting “facts” but rather only allegations (“There were allegations,” “There were reports,” “allegedly”) that were not verified as required in this Court for allegations of such gravity. The cited report also noted that many “facts” are actually rumors initially spawned by propaganda:

Verification of these reports was extremely difficult, particularly those emanating from remote areas and those affected by active combat, primarily in eastern DRC. Independent observers often found access

difficult due to hazardous security conditions and frequent impediments imposed by authorities. *Both pro- and anti-DRC Government forces used propaganda disseminated via local media extensively, including accusations of abuse by opposing forces, further complicating efforts to obtain accurate information regarding such events.*

(DRCR Annex 86, Section 1(a); emphasis added.)

552. Similarly, the publication of the European Congo Network (REC) (DRCR Annex 98), also cited as proof by the DRC (*see* DRCR, para. 5.10, n.15), recognises the potential for inaccurate information:

*[Le REC] n'accepte aucune responsabilité sur la précision des sources originales. Devant la nécessité de vous tenir rapidement informés, le secrétariat prend le parti de n'être pas toujours en mesure de vérifier ces informations, et ne saurait être tenu responsable d'erreurs factuelles.*¹¹⁸

(DRCR Annex 98, p. 1; emphasis added.)

553. The DRC's various "confirming" documents make clear that ASADHO and others were not presenting accurate eyewitness accounts, but rather were -- as DRCR Annex 86 suggests (*supra*, para. 551) -- more likely simply repeating stories which began as pro-DRC and anti-Uganda propaganda, and which then became part of the mythology of the area before being repeated as "fact." Thus, the DRC cites a Congolese NGO's report of a "massacre" on "8 September 2000" at a wedding ceremony in "Butuhe village" or "Butuhe, Kikele village." (DRCR, para. 5.09, citing *Solidarité pour la promotion sociale et la paix*.) The DRC next states that the

¹¹⁸ "[The REC] does not accept any responsibility for the accuracy of the original sources. Because of the necessity to keep you quickly informed, the secretariat is not always in a position to verify this information and is not therefore responsible for any factual errors."

“truth of these various attacks against civilians” including the purported attack in Butuhe, “was confirmed by the testimonies gathered on the ground by the researchers of Human Rights Watch.” (DRCR, para. 5.09.) The Human Rights Watch publication, however, stated that the alleged massacre at Butuhe or the nearby village of Kikere took place in response to an 8 November 2000 Mai-Mai ambush, a *two-month* discrepancy. (DRCR Annex 83, p. 35 and nn. 154-55.) It thus becomes apparent that the alleged “human rights violations” do not have their source in eyewitness accounts, but rather in stories which may well have begun as propaganda and then became distorted over time.

554. In addition, the publication on which the DRC relies for the 8 September 2000 version of the “wedding” story (DRCR Annex 97) mentions Uganda or her troops only once, in connection with that single purported incident. As discussed immediately above, that single allegation against Uganda is contradicted by other publications on which the DRC relies. (*Supra*, para. 553.) Moreover, the publication clearly points *away from* Uganda when assigning responsibility:

Après analyse et étude des cas des violations des droits de l’homme dans la ville de Goma, nous avons trouvé que grand nombre des violations sont commises soit directement par les autorités du RCD soit par des éléments de son armée. Plusieurs autres cas des violations des droits de l’homme perpétrés par des personnes non identifiées se font toujours enregistrés [sic.] par-ci par-là dans la ville de Goma. Cette situation s’explique plus par le fait que les militaires restent impayés et aussi par le fait qu’ils sont incontrôlés. Cela favorise le trafic d’armes à feu qui est à la base des plusieurs sortes des violations, nous citons: le vol à mains armées, les tueries, viols, la soumission à la torture...

.....

La plupart des massacres ont été commis par l'APR au temps de l'AFDL comme au temps du RCD. La responsabilité se partage entre l'APR et les autorités politico-militaires de ce mouvement. Les massacres commis par les milices seraient aussi à leur charge parce qu'ils ne fournissent aucun effort pour les anéantir. Bien au contraire, ils font avec elles des alliances pour tel ou tel autre intérêt politique. Cette population civile massacrée ne présentait aucun signe d'homme prenant part aux hostilités.¹¹⁹

(DRCR Annex 97, pp. 11-12.)

555. The DRC also picks and chooses from the various publications she cites, noting passing (and utterly unsupported) references to Ugandan troops while totally ignoring far more serious evidence against her own troops. Thus, for example, the DRC cites the Seventh Report of the UN Special Rapporteur on Human Rights (DRCR Annex 82) with respect to one incident alleged, with absolutely no probative evidence or source identification, to have been committed by unnamed "Ugandan troops." (DRCR, para. 5.12.) The DRC ignores the ultimate conclusions of that report with regard to "violations of international humanitarian law" and "human rights." Those

¹¹⁹ "Having analysed and studied cases of violations of human rights in Goma town, we found that a big number of violations were committed either directly by the RCD authorities or by elements of its army. Several other cases of human rights violations perpetrated by unidentified people occur from time to time in Goma town. This situation is caused by the fact that the army men are unpaid and uncontrolled. This led to fire arms trafficking thus causing several kinds of violations: armed robbery, killings, rape, torture....

.....

Most massacres were committed by the RPA during the time of the AFDL and during the time of the RCD. The RPA and its political military authorities share the responsibility. They are also responsible for massacres carried out by the militias because they have made no effort to put an end to them. On the contrary, they make alliances with them for different political interests. The civilians massacred did not show any sign of having taken part in any hostilities."

conclusions not only stated that rebel forces and the DRC Government -- but *not* Uganda -- were in control of territory in eastern Congo but also named the RCD, RCD/ML, Rwandan forces *and the DRC Government* -- but *not* Uganda -- as responsible for the violations:

Violations du droit humanitaire international.

162. Les faits les plus graves sont les massacres de civils commis par les forces du RCD et des Rwandais et les attaques contre les civils dans les querres entre forces rwandaises et forces ougandaises. Des prisonniers ont été mutilés, frappés et castrés. Pour sa part, le Gouvernement est responsable des crimes commis par les mai mai contre les militaires en marge du conflit et contre les populations civiles qui auraient appuyé les forces rwandaises. Il est également responsable des bombardements de populations civiles dans le nord.

Droits de l'homme

163. Dans le territoire contrôlé par le Gouvernement, il est surtout porté atteinte aux droits politiques (droits de participation, de réunion, d'association et liberté d'expression). Dans les territoires contrôlés par le RCD, le RCD/ML, les droits qui font l'objet des violations les plus graves sont les droits fondamentaux (droit à la vie et à l'intégrité physique), mais également les libertés politiques. On ne dispose pas d'informations suffisantes sur le territoire contrôlé par le MLC, bien qu'à Gbadolite il

*ne règne pas le même climat de terreur qu'à
Goma, Bukavu ou Kisangani.*¹²⁰

(DRCR Annex 82, paras. 162-63.)

556. The accusations that Ugandan forces massacred Congolese civilians are, in short, unfounded or, in fact, contradicted by the very publications which the DRC presents to this Court.

(2) *Claims that Ugandan forces did not take measures to protect civilians in combat operations*

557. Uganda restates its total respect for international human rights standards, and reiterates that it adhered to them in its limited intervention in eastern Congo.

558. The DRC cites documents that do not point to any culpability of Ugandan forces. Some of the cited publications merely record the fact that there was armed hostility between various protagonists in which civilians died, without mentioning Uganda at all, while the bulk make unverified accusations without providing evidence.

559. For example, in paragraphs 5.14 to 5.16 of the *Reply*, the DRC cites various publications alleging that civilians died in

¹²⁰ “162. Violations of international humanitarian law. The most serious incidents are the massacres of civilians by RCD and Rwandan forces and attacks on civilian during the Rwandan-Ugandan wars. Prisoners have been mutilated, beaten and castrated. The Government, for its part, is responsible for the crimes committed by the Mai-Mai against soldiers at the edges of the conflict and against civilian populations which allegedly support the Rwandan forces. It is also responsible for its bombing of civilian populations in the north.

163. Human rights. In Government-controlled territory, the rights most affected are political rights (participation, assembly, association and freedom of expression). In RCD and RCD/ML-controlled territory, the rights most often violated are basic rights (life and physical integrity) without prejudice to political freedom. There is insufficient information on MLC-controlled territory, although Gbadolite does not live in the same climate of terror as Goma, Bukavu and Kisangani.”

the fighting between Ugandan and Rwandan forces in 1999 and 2000. However, while indicating that civilians were killed in the hostilities, these publications (*Amnesty International*, *Le Groupe Lotus*, and *The Interinstitutional Assessment Mission Reports*) do not indicate who was to blame for the deaths.

560. The sole effort by the DRC to link instances of civilian injuries and deaths with Uganda is contained in paragraph 5.17 of the *Reply*, which selectively cites the *MONUC Historic Record of Kisangani Cease-fire Operation*. (DRCR Annex 84.) Though this publication purportedly constitutes a record of events of only one incident, the DRC seeks to transfer the reference to Uganda in the MONUC Record to all the other civilian deaths and injuries covered by other publications. The DRC implicitly argues that since the MONUC Record alleges a violation of human rights, that constitutes proof with respect to different incidents which allegedly occurred at different places and at different times. There is absolutely no logical ground on which any such inference can be drawn.

561. Allegations with respect to Kisangani are inadmissible in this proceeding. (*Supra*, paras. 33-36; *infra*, para. 611.) Without prejudice to or waiver of that position, Uganda notes that while the DRC cites portions of the MONUC Record criticising Uganda for allegedly firing over certain sites in Kisangani (*e.g.*, homes and the UN headquarters), those allegations, even if accurate, would not establish culpability on the part of Uganda, because the Record does not indicate whether any such sites were intentionally targeted or the circumstances of any such firing. Moreover, the DRC omits portions of the MONUC Record which make clear that there were military targets in those areas:

RPA placed their mortar and artillery batteries within the downtown homes and also at the Riviere Gauche right next to the line of our HQ...

(DRCR Annex 84, para. E.) The MONUC Record simply does not permit the conclusion that Uganda violated “international practice,” much less any international law. (*Ibid.*)

562. The MONUC Record is not the only publication cited inaccurately, selectively, or out of context by the DRC. For example, the Report by *Groupe Lotus* (DRCR Annex 94) does not, even once in the excerpted pages, mention Uganda or its troops, except to state that RCD/Goma soldiers were “pretending to be looking for Ugandan soldiers” when the RCD/Goma soldiers engaged in looting. The *Groupe Lotus* Report actually chronicles a number of wrong-doings by RCD-Goma, which had no links with Uganda. (See DRCR Annex 94, para. III.1.1.)

(3) *Claims that Ugandan forces fueled ethnic conflicts between Congolese tribes*

563. The DRC’s assertions that Ugandan forces “fueled” ethnic conflicts are likewise false. First, the DRC again proceeds from the erroneous assumption that Uganda was an “occupying State,” referring to the “*région de l’Ituri, l’une des parties du territoire congolais soumises à l’occupation ougandaise.*”¹²¹ (DRCR, para. 5.21; emphasis added.) All of the allegations against Uganda respecting the alleged participation of UPDF troops in the ethnic rivalry between the Hema and the Lendu tribes are made in the context of this fundamental misconception that UPDF troops “occupied” the Ituri region. As already demonstrated, nothing can be further from the truth. (*Supra*, paras. 170-74, 204-210, 407, 525.) If this faulty premise is eliminated, no viable claim against Uganda can survive.

564. Second, with one exception where “direct involvement” was alleged (*see infra*, para. 566), the DRC essentially blames Uganda on the theory that Uganda’s mere presence led to clashes between the two ethnic groups. For example, one document (DRCR Annex 81) simply says that “*l’occupation ougandaise de la région de l’Ituri a déclenché un conflit entre les Bahema [i.e., Hema] et les Balendu [i.e., Lendu].*”¹²² (*Ibid.*,

¹²¹ “Ituri region, which is one of the parts of Congolese territory that are under Ugandan occupation.”

¹²² “the Ugandan occupation of the Ituri region has led to conflict between the Bahema [*i.e.*, Hema]...and the Balendu [*i.e.*, Lendu].”

para. 26.) Similarly, the DRC talks of the “destabilising effect” of the “presence” of the Ugandan troops (DRCR, para. 5.22), of unspecified “support” and “encouragement” (DRCR, para. 5.21), and of the “passive complicity” of Ugandan soldiers. (DRCR, para. 5.24.)

565. The impression created is that UPDF troops would have been able to prevent, and should have prevented, clashes between the two ethnic groups. This implication, however, again relies on the erroneous premise that UPDF troops were actually in occupation of the region, and were therefore charged, as an occupying force, with the responsibility (and the police powers) to maintain civil order. Ugandan troops in the region, however, only secured strategic military targets and did not engage in general civil administration. (*Supra*, paras. 170-74, 198, 201, 204-210, 407, 525.) The assertion that they are internationally responsible for the ethnic conflicts by omission, “presence” or “passive complicity” is therefore unwarranted.

566. The scant “evidence” proffered by the DRC to show Uganda’s so-called “direct involvement” (“*participation directe*”) simply states that unspecified “Ugandan troops” engaged in wrongful activity. Like virtually every allegation made by the DRC, this allegation is not accompanied by evidence and fails to identify the source of the purported information. (DRCR, para. 5.23; DRCR Annex 81, para. 104.) Indeed, the statement in the source document that Ugandan troops were “in alliance with the Bahema” (*ibid.*, para. 104) suggests that the DRC is seeking to attribute culpability to Uganda for actions (if there were any in the first place) actually undertaken by the Bahema, or that the source document is at a minimum imprecise in identifying whether the actual actors were Bahema or Ugandans, if either.

567. The various sources also seem to proceed from a misconception that the Ugandans were hostile to the Lendu, who are more closely related to the Hutu, and would favor the Hema, who are more closely related to the Tutsis. (*See* DRCR, para. 5.25.) The basic assumption that the Ugandans had reason to support and encourage the Hema in attacks on the Lendu is simply wrong, since many more Ugandans living on the

Ugandan side of the border nearest to the Ituri region of the DRC are closer in terms of culture and language to the Lendu than to the Hema.

568. The DRC allegations also distort the historical context of the Hema-Lendu conflict. The truth of the matter is that the conflict between the Lendu and the Hema peoples is deeply rooted, predates the current conflict, and is intimately entwined with issues of distribution of political and economic powers between them. This has been established by countless historical accounts, including some of the DRC's own sources, including, for example, *Pourquoi tant de confrontations au Nord-Kivu et en Ituri?*. (DRCR Annex 78.)¹²³ Uganda has already explained this complex historical situation in its official response to the Third UN Panel Report:

The Hema/Lendu conflict is historical and was triggered off by a fight for land. The late Mobutu compounded it when he took sides with the Hema against the Lendu by giving them land. The UPDF therefore did not create this conflict. Facts on the ground clearly demonstrate that the security situation in all the other areas where the UPDF withdrew such as Gbadolite, Gamena, Buta, Beni, etc there is relative peace.

(UR Annex 103, para. 16.)

569. The allegations presented by the DRC in this regard are also internally contradictory and inconsistent. On the one hand, the DRC claims that Uganda has sided with the Hema people against the Lendu. (DRCR, paras. 5.22-5.24.) But on the other hand, the DRC claims that Uganda has been providing military training to both the Hema and the Lendu. (DRCR, para. 5.25.) The DRC offers no cogent explanation for the contradictory assertions it makes, other than making the utterly unsupported assertion that the Ugandan Army wanted "as many 'back-up'

¹²³ "Why so much conflict in North-Kivu and Ituri?"

troops as possible” to fight the Mai-Mai ethnic militias. (*Ibid.*) If the UPDF “openly took sides” with the Hema, it would have been absurd for the UPDF to train the Lendu so that they could battle the Hema. Again, as is its practice, the DRC offers no proof to explain away the inconsistencies in her story.

570. The allegation that Uganda fanned conflagrations between the Hema and the Lendu is, finally, belied by the fact that even the DRC has recognised Uganda’s role as a peacekeeper in the tribal disputes in the Ituri region. Thus, under the 6 September 2002 Luanda Agreement between Uganda and the DRC, the UPDF was specifically required to remain in the Ituri region as a contributor to law and order until an administrative authority capable of enforcing the laws could be established. (*Infra*, paras. 598-604.)

(4) *Claims that Ugandan forces destroyed villages and homesteads.*

571. To bolster its claims that Ugandan forces destroyed villages and homes, the DRC relies on the same sort of documents already demonstrated to lack evidentiary value and credibility, emanating from groups with a political agenda such as Grand-Nord or simply making accusations without offering any factual evidence or identifying any sources. For example, the DRC relies (DRCR, para. 5.28) on a Grand-Nord publication, one of the authors of which is Chairman of ASADHO and which proceeds from the mistaken premise that Uganda participated in the First Congo War. (*Supra*, paras. 115, 161-66, 415-16.) But even if its inherent incredibility is ignored, the Grand-Nord publication merely declared that between 28 March and 9 April 2001 “*réquisition forcée de véhicules civils de Butembo par des militaires Ougandais de l’UPDF et Congolais du FLC*,”¹²⁴ and then listed the alleged damage to property supposedly committed by those unidentified soldiers. (DRCR Annex 96, p. 1.) Apart from the utterly unexplained and unsupported insertion of the words “*des*

¹²⁴ “certain Ugandan and FLC soldiers forcibly captured civilian vehicles from Butembo.”

militaires Ougandais,” nothing indicates any Ugandan involvement in the incident.

572. In addition, although the DRC seeks to blame the unnamed “Ugandan soldiers” for the property damage, nothing in the Grand-Nord publication assigns such blame, even if its allegations are taken at face value. Rather, the publication indicates that the purported journey of the unidentified “Ugandan soldiers” “was met with clashes with the Mai Mai along the Butembo-Manguredjipa access” and nothing indicates whether the property damage along that road was caused by the purported Ugandan soldiers, the FLC, or the Mai Mai. (*See ibid.*)

573. Another example given by the DRC, which again shows the incredibility of the publications on which it relies, is the supposed attack on Butuhe (DRCCR, para. 5.28), which -- as already noted -- one DRC source stated occurred on 8 September 2000 and another stated occurred on or after 8 November 2000. (*Supra*, para. 553.) And, as is common, there was no identification of any of the supposed Ugandan troops, nor any basis for believing that Ugandan troops were involved at all, if any such incident occurred in the first place. All of this points to one inescapable fact -- the DRC is relying on information that likely has its source in her own anti-Ugandan propaganda, which then became woven into the folklore of the region and repeated as fact to interviewers who made no effort to obtain independent verification.

(5) *Claims that Ugandan forces used torture and other forms of inhumane treatment*

574. The DRC’s claims as to alleged “torture” and “inhuman treatment” rest almost exclusively on the ASADHO allegations that Uganda has already demonstrated to be partisan, biased and unreliable. As discussed above, ASADHO has made clear by its own words that it is not objective, but rather that its intent is to force “a withdrawal of the Ugandan troops” from the DRC. (*Supra*, paras. 533-34.)

575. Where the DRC relies on other documents (other than the ASADHO publications), such as a so-called “report” by Amnesty International (DRCR, para. 5.30), the quoted publication itself candidly makes clear that it is in turn relying on second- and third-hand stories. (DRCR Annex 89: “*D’après les informations transmises par plusieurs groupes de défense des droits humains ainsi que par d’autres sources,*”¹²⁵ “*Amnesty International a reçu des informations,*”¹²⁶ and so on.) In an environment where the DRC Government and others were disseminating propaganda, and where rumors could readily pass from person to person without any basis in fact, the type of publications relied on by the DRC cannot be credited. Indeed, the Secretary-General of the United Nations put in doubt the credibility of the Amnesty International “report.” (DRCM Annex 26, para. 46: “...it is difficult to confirm recent reports by Amnesty International that the human rights situation has recently deteriorated...”; emphasis added.)

576. The one other document that the DRC hopes will vicariously give credibility to its otherwise unsupported allegations of torture is the Third Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo. (DRCM Annex 26.) The DRC refers to this report ostensibly to show that “many sources” independently recorded the alleged torture. (DRCR para. 5.29.) Unfortunately for the DRC, the report is explicitly clear that, rather than being an independent source of information, it merely relies on the reports from the “local human rights non-governmental organisations.” Unlike situations where the Secretary-General reports from first-hand sources, this report is clear that the information is simply being relayed from unconfirmed third-hand sources:

In the rebel-held areas, recent outbreaks of heavy fighting, especially in Equateur Province, *reportedly* involve severe human rights violations. *According to several*

¹²⁵ “According to several human rights groups and other sources.”

¹²⁶ “Amnesty International has received reports,”

reports from local human rights non-governmental organisations in the eastern region of the country, rebels, the Ugandan and Rwandan armies and non-signatory armed groups engage in systematic use of torture, rape and robbery, the restriction of movement and enforced deportation.

(DRCM Annex 26, para. 49; emphasis added.)

577. In the circumstances, it is not difficult to conclude which “local non-governmental organisations” most likely provided unconfirmed allegations to the Secretary-General. Since the Secretary-General’s report clearly indicates that it is merely relating unconfirmed “reports” from elsewhere, it is disingenuous for the DRC to imply that the report itself is an independent source which confirmed “facts which have already been mentioned.” (DRCR, para. 5.29.)

578. The claims of ASADHO and, by extension, the DRC provide no evidentiary basis for imputing blame to Uganda. Claims are broadly made against “Ugandan soldiers,” with no evidentiary basis for concluding that any perpetrators of any wrongs (to the extent they actually occurred) were in fact members of the UPDF. Indeed, when ASADHO and the DRC do seek to embellish their allegations with purported “facts,” they simply demonstrate their unreliability.

579. Thus, one of ASADHO’s publications (DRCR Annex 92) that the DRC quotes extensively in making claims of torture states, in a bid to demonstrate its authenticity, that the detention pits that were supposedly used by Ugandan soldiers were called “mabusu.” The ASADHO publication and the DRC, seeking to impute blame to Uganda, go on to claim that “mabusu” is a Kiganda name for “a place of detention from which one cannot escape” and that Kiganda is a “language spoken in Uganda,” and also asserts that the pits were “supervised by a Ugandan officer called HAYU.” (*Ibid.*; see DRCR, para. 5.32.) In truth, however, the word “mabusu” (“mahabusu”) is a Swahili word for a prisoner, and Swahili is a language spoken throughout the

States of East and Central Africa.¹²⁷ Thus, any use of the word “mabusu” does not link the user to Uganda. The incredibility of the DRC’s sources is further revealed by the fact that there is not and has never been an officer of the UPDF with the name Hayu, and by the fact that Hayu is not a Ugandan name. (UR Annex 107, paras. 10-11.)

(6) *Claims that Ugandan forces recruited child soldiers.*

580. The DRC’s allegations that Uganda recruits child soldiers are, as even the DRC admits, framed only in “general terms” lacking evidentiary support. (DRCR, para. 5.36.) Where the DRC attempts to provide more specific examples of Uganda recruiting child soldiers, she does so only by distorting the truth and by misquoting and mischaracterising the publications which she cites.

581. The incident alluded to by the DRC (DRCR, paras. 5.34-5.36) was not one of child abduction but rather was a case where scores of children were rescued by the joint efforts of the Government of Uganda, UNICEF and various other non-governmental organisations. After an outbreak of Hema/Lendu fighting in Bunia about 600 people were airlifted to Uganda at the request of parents and Congolese authorities. At a non-military school, the children received treatment and counseling to overcome the effects of the trauma they had endured in the DRC. The Deputy Permanent Representative and Chargé d’Affaires a.i. of Uganda provided the true version of events to the Security Council:

Recruitment and deportation of Congolese children to Uganda: Contrary to what is written, the truth is that following the outbreak of the recent ethnic fighting in Bunia, about 600 people, including children, were airlifted to Uganda. This was at the request of parents and Congolese authorities. The children (163) have since been handed

¹²⁷ A Swahili-English dictionary is available at <http://www.yale.edu/swahili/>.

over to UNICEF -- on 22 February 2001. The Minister for the Presidency handed them to UNICEF, UNHCR and Save the Children, for settlement. It is again on record that the United Nations applauded Uganda for this in the UNICEF statement issued in New York in February 2001.

(UR Annex 48, para. 4(d).)

582. The DRC not only misstates that the children were “kidnapped and taken to Uganda” (DRCR, para. 5.35), but also manipulatively juxtaposes a text referring to a completely different situation (ostensibly the “Nyakaleke Camp”) to create the impression that the children were in military training and that their “living conditions were terrible.” (DRCR, paras. 5.34-5.35.) Again, both suggestions are untrue. The truth of the matter, as gratefully acknowledged by UNICEF in its praise to the Government of Uganda (UR Annex 48, para. 4(d)), is as stated by Uganda in her response to the Third UN Panel Report -- the children were not “abducted” and they were not in military training:

Kyankwanzi is a National Leadership Institute and not a military training camp. The children were rescued from a mutiny by Mbusa Nyamwisi and John Tibasiima against the leadership of RCD-K under Prof. Wamba dia Wamba in Bunia and taken to the Kyankwanzi Leadership Institute for care and counseling in 2001. The children were subsequently handed over to UNICEF Uganda and the Red Cross, which in turn put the children under the care of World Vision at Kryandongo in Uganda. UNICEF Kinshasa arranged to receive and re-unite the children with their families after the conflict eased.

(UR Annex 103, para. 26.)

583. Not surprisingly, given the true facts, the Secretary-General's Reports (DRCR Annexes 30, 31) on which the DRC relies (DRCR, para. 5.34) do not state that Uganda recruited child soldiers. Rather, the Secretary-General specifically and expressly cited only the RCD and MLC Congolese rebel organisations for openly urging the recruitment of child soldiers for local defence. It is in this context that the Secretary-General stated that some of these recruited children had allegedly crossed the border into Uganda, mentioning the involvement only of Congolese "mutineers" against the leadership of the RCD-ML (DRCR Annex 30, para. 75) and of the RCD. (DRCR Annex 31, para. 65.) There is not even a suggestion that Ugandan forces or the Ugandan Government were involved in any way with the recruitment and deportation of child soldiers.

584. The DRC also misleadingly juxtaposes a supposed "acknowledgement" by Maj. Phinehas Katirima with a discussion of child soldiers, seeking to suggest that Uganda admitted that she was training child soldiers. (DRCR, para. 5.34.) The Human Rights Watch publication cited by the DRC is of limited credibility in the first place, because its source was apparently only a newspaper article. (DRCR Annex 83, at n.92.) Even if taken at face value, however, the publication merely quoted Maj. Katirima discussing Congolese "mutineers who attempted to topple the RCD-ML leadership," and *not* in any way discussing child soldiers. (*Ibid.*) Contrary to the impression which the DRC is trying to create, there was no admission by Maj. Katirima that Uganda was training child soldiers, and any such admission would have been contrary to fact.

585. Finally, contrary to the DRC's slurs, the UNICEF documents (DRCR Annex 88) and the Eighth Report of the Secretary-General (DRCR Annex 34, para. 54) on which the DRC relies (DRCR, para. 5.35) do not support the claim that Uganda took part in the recruitment of child soldiers. Both sets of documents actually *thank* and *praise* the Ugandan authorities for facilitating the demobilisation, travel and re-integration of Congolese child victims of the Hema/Lendu fighting who had come under Uganda's protection. Again, the DRC

misrepresents the substance of documents in order to impugn Uganda.

(7) *Claims that Ugandan forces terrorised Congolese civilians*

586. The DRC next attempts to show that Ugandan troops carried out acts of violence against Congolese civilians, and in particular Catholic priests, purportedly because the Catholic Church demanded the withdrawal of Ugandan and Rwandan troops from Congo. (DRCR, para. 5.37.)

587. As already noted (*supra*, para. 552), the publication of the European Congo Network (REC) on which the DRC primarily relies for these allegations (DRCR Annex 98) itself makes clear that it cannot be credited as a source of evidence:

*[Le REC] n'accepte aucune responsabilité sur la précision des sources originales. Devant la nécessité de vous tenir rapidement informés, le secrétariat prend le parti de n'être pas toujours en mesure de vérifier ces informations, et ne saurait être tenu responsable d'erreurs factuelles.*¹²⁸

(*Ibid.*, p. 1; emphasis added.) Accordingly, both the REC publication and the Catholic Church announcement on which the DRC relies refer to unnamed “Ugandan soldiers” without further evidentiary basis, and cannot support the DRC’s accusations against Uganda.

588. The DRC’s allegations with regard to Catholic priests exposes another flaw in her arguments. Throughout the *Reply*, the DRC attempts to portray Ugandan forces as blood-thirsty troops who engaged in widespread murders and torture. The DRC also asserts that Catholic priests were the “major target” of Ugandan soldiers, who “wanted to take revenge” because the

¹²⁸ “REC does not accept any responsibility for the accuracy of the original sources. Because of the necessity to keep you quickly informed, the secretariat is not always in a position to verify this information and is not therefore responsible for any factual errors.”

priests wanted the soldiers to return to Uganda. (DRCR, para. 5.37.) Yet the alleged incidents of violence against the priests amount to thefts and beatings. Such incidents -- if they actually occurred and were proven by the DRC, which is not the case -- could of course not be condoned. But there is an inescapable inconsistency in the DRC's allegations. The DRC asserts that priests, the "major target" of the UPDF, were robbed and beaten, while at the same time asserting far more horrific conduct toward others who were allegedly the focus of less enmity. In short, the DRC's story, particularly its allegations of more serious wrongs against those other than priests, simply does not make sense.

(8) *Claims that Ugandan forces looted and destroyed private property.*

589. In claiming that Ugandan forces looted and destroyed private property, the DRC again follows her pattern of offering wild accusations, misquoting sources, and failing to offer any cogent or coherent evidentiary support. For example, the DRC alleges that eight soldiers, "one of whom was a Ugandan officer," robbed a shop in Biambwe. (DRCR, para. 5.39.) The source again is a partisan Grand-Nord publication. (DRCR Annex 96; *see supra*, paras. 539-41.) But the DRC misuses even the unsupported allegations of the Grand-Nord document, which states only that a Ugandan "soldier" and not a Ugandan "officer" was involved in the incident. (*Compare* DRCR, para. 5.39 *with* DRCR Annex 96, p. 2.) In any event, as is typical in the *Reply*, no explanation is given as to how this unidentified Ugandan soldier was recognised as such, or by whom. There is, of course, also the unlikelihood that a small shop in Biambewe, even if "very busy," would have had 60,000 American dollars on hand to be stolen as the DRC alleges. (DRCR, para. 5.39.) There is simply not enough credible evidence here to establish any Ugandan involvement in the incident, or, indeed, even to establish that such an incident occurred.

590. All of the DRC's other accusations of looting and theft by Ugandan soldiers are also framed in the most general terms and without any effort to provide the requisite supporting evidence. (DRCR, paras. 5.40-5.42.) The DRC again turns to

the partisan and discredited ASADHO publication for support. (DRCR, para. 5.41.) The DRC also adds totally unsupported allegations that Ugandan troops were looting because Uganda intended “to maintain its army ‘on the country’” (DRCR, para. 5.42), an assertion that has been shown to be demonstrably false in Chapter IV of this *Reply*. (*Supra*, paras. 425-26.)

591. Finally, the Human Rights Watch publication cited by the DRC by its very terms negates the DRC’s allegations that thefts were part of a “policy of terror” of Ugandan forces. (*See infra*, paras. 592-95.) Thus, Human Rights Watch -- even if its second- and third-hand allegations of wrongdoing were to be believed -- states that Ugandan forces were acting not as part of an official “policy of terror” but because there was a “lack of command.” (DRCR, para. 5.40.)

(9) *Claims of a Ugandan “policy of terror”*

592. The DRC’s final accusation is that the alleged incidents she recounts were part of a Ugandan “policy of terror” rather than merely “isolated and ‘accidental’ incidents.” (DRCR, para. 5.43.) The DRC’s argument is without merit on its face.

593. As set forth at length above, the DRC has failed to prove that the alleged individual incidents occurred in the first place. The DRC relies primarily on the reports of ASADHO, again, a demonstrably partisan, anti-Ugandan group, and on other unsubstantiated reports of unidentified “Ugandan soldiers” engaging in misconduct. The DRC then compounds the inadequacies of its source documents by misquoting and mischaracterising them, concocting accusations against Uganda that not even the source documents dare to make. Because there is no credible evidence that the incidents occurred in the first place, Uganda cannot be faulted for failing to “punish” the unidentified, indeed non-existent, “Ugandan soldiers” who purportedly committed the wrongs.

594. Moreover, the DRC stumbles over its own arguments in attempting to impute liability to Uganda. Thus, the *Reply* emphasises the “varied nature” (“*diversité*”) of the alleged incidents, an allegation that is inconsistent with the DRC’s

claim that they were “systematic practices.” (DRCR, para. 5.43.) “Varied” incidents -- if any incidents happened in the first place, which is not the case -- would demonstrate wrongs perpetrated by individuals acting on their own, rather than “systematic practices” and a centrally orchestrated “overall policy.”

595. In fact, contrary to showing a “policy of terror,” even the DRC’s sources show that Uganda did not ignore the allegations made against its soldiers. For example, Amnesty International reports that Ugandan commanders, rather than ignoring allegations of wrongdoing, investigated allegations with respect to the fighting in Kisangani. (DRCR, para. 5.43.) As the Amnesty International publication states, there were no legal proceedings not because wrongdoing, if any, was condoned, but rather because the alleged facts could not be established. (*Ibid.*)¹²⁹

**D. The United Nations And The DRC Herself
Have Recognised And Affirmed Uganda’s
Peacekeeping Role**

596. The United Nations has repeatedly recognised that Uganda, rather than engaging in a “policy of terror” in eastern Congo as the DRC asserts, has performed and continues to perform a vital role in defusing violence in the area. If Ugandan troops had indeed been engaging in the reign of terror falsely portrayed by the DRC, the United Nations and others interested in the welfare of eastern Congo would have taken every conceivable opportunity to force the UPDF from the area as quickly as possible. But exactly the opposite has occurred -- the United Nations and even the DRC have encouraged Ugandan troops to remain in the region because of their vital contribution to maintaining the peace.

597. As already discussed at length, when President Museveni sought to withdraw all Ugandan troops from eastern

¹²⁹ Allegations with respect to Kisangani are, in any event, inadmissible in this proceeding. (*Supra*, paras. 33-36; *infra*, para. 611.) Uganda does not hereby waive that position.

Congo in early 2001, the Secretary-General implored him not to do so. It may be presumed that if the UPDF had actually been engaged in widespread looting and human rights violations as the DRC alleges, the Secretary-General would have welcomed President Museveni's announcement of troop withdrawal with open arms. Instead, on 4 May 2001, the Secretary-General wrote to President Museveni specifically asking that Ugandan troops not withdraw immediately or unilaterally from the DRC. President Museveni felt he had no choice but to accede to the Secretary-General's request. (UR Annex 56; *see supra*, paras. 221-23.)

598. Documentary evidence establishes that Uganda, rather than encouraging bloodshed between the Hema and the Lendu in the Ituri region, has sought to use its influence to prevent violence between the two rival ethnic groups. Thus, on 1 February 2002, Ugandan Minister of State for Defence Hon. Amama Mbabazi addressed a letter to the President of the Security Council expressing concern about the deteriorating security situation in the Ituri region. (UR Annex 75.) Hon. Mbabazi noted with alarm that once Ugandan forces had been concentrated at the airport in Bunia, widespread killings of civilians and of combatants had occurred, ranging from hijackings on the roads outside Bunia to murders and burnings of villages. The letter also noted that tribesmen, mainly Lendu, were organising to attack various nearby villages, and that groups were being armed to commit genocide. (*Ibid.*)

599. Rather than "encouraging" or even tolerating the deteriorating situation in the Ituri region, as the DRC alleges, Uganda made clear that the state of affairs was not acceptable to her, for it not only threatened the security of Uganda's borders but also had negative implications for the stability and future of the DRC. (*Ibid.*) Hon. Mbabazi invited the United Nations (acting through MONUC) to work to find a solution to the problem. Hon. Mbabazi further noted the possibility that Uganda might have to redeploy its troops to stop the carnage, but asked for the advice and "clear opinion" of the Security Council before taking such action. (*Ibid.*)

600. Uganda re-deployed her troops back to Bunia to restore security in the face of escalating violence only after being specifically asked to do so by Mr. Amos Ngongi Namanga, the Special Representative of the UN Secretary-General to the DRC. Contrary to the claims of the DRC, Uganda was, in fact, extremely reluctant to re-assign her troops to Bunia, and advised the Security Council that she was only doing so following the specific request of Mr. Namanga. Thus, in a letter dated 5 February 2002 addressed to Mr. Namanga and distributed to the Security Council via a letter dated 13 February 2002, Hon. Mbabazi wrote:

I acknowledge receipt of your [Mr. Namanga's] letter dated 2 February 2002 concerning the increase in violence in northeastern Democratic Republic of Congo.

We had withdrawn our troops because of the persistent misrepresentation of the Uganda Peoples' Forces (UPDF) role in the problems of the area and the consequent malignment that the Government of Uganda suffered. No one, including the United Nations, came to our defence, although it was clear that the UPDF role was positive.

The Uganda government, therefore, welcomes your recognition of this and will immediately re-deploy in the areas of tribal conflict to restore security.

(UR Annex 76.)

601. Indeed, in addition to the outright acknowledgement by the UN Special Representative that, contrary to the unsupported allegations of the DRC, UPDF troops are an important stabilising factor in Bunia and play an essential role in the protection of human rights in the area, the UN Secretary-General himself has also recognised Uganda's positive role in the area. Uganda noted this acknowledgement by the UN Secretary-General, and put the Hema-Lendu conflict in its

proper historical context, in a letter to the UN Security Council dated 14 March 2001:

Hema/Lendu conflict: Uganda is accused of direct involvement in the outbreak and continuation of inter-ethnic fighting between the Hema and the Lendu. Again the Charge d'affaires is not being honest about the history of his country. What are the facts? Uganda has done its best to stop inter-ethnic fighting, pacify the affected areas and unite the various groups in the Democratic Republic of the Congo, historical rivalry between Hema and Lendu notwithstanding. The Secretary-General acknowledged Uganda's positive role in his report on the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) of 12 February 2001 (S/2001/128, para. 27): "Since 22 January 2001 MONUC military observers in Bunia have reported the situation in town to be tense but with Ugandan People's Defence Force (UPDF) in effective control."

(UR Annex 48, para. 4(c).)

602. Finally, on 6 September 2002, President Yoweri Museveni of Uganda and President Joseph Kabila of the DRC met in Luanda, Angola and reached an Agreement which is fatal to the DRC's allegations that Uganda bears responsibility for the Hema-Lendu conflict. The Presidents reviewed the situation in eastern Congo and reached an accord setting forth a methodology to put an end to the conflict, to withdraw Ugandan troops from the DRC, and to normalise relations between the two countries. (UR Annex 84.)

603. In Paragraph 3 of the Luanda Agreement, the DRC explicitly recognises that the continuing presence of Ugandan troops in the Ituri region is critical to the maintenance of peace and public order in that area. Specifically, that paragraph

provides that the DRC, Uganda and MONUC will put in place a Joint Pacification Committee on Ituri consisting of the parties (including both the DRC and Uganda), other forces active in the area, and legal grassroots communities. (*Ibid.*, para. 3.) Only after that Pacification Committee has been established and is operating, and only after the Committee determines a “mechanism to maintain law and order in Ituri Province,” establishes “[a]dministrative authority in Ituri Province,” and installs a “law enforcement mechanism to replace UPDF” would Uganda begin the withdrawal of its troops from Bunia (the principal town in the Ituri region). (*Ibid.*, Annex A.)¹³⁰ Moreover, only after the Pacification Committee has completed the “establishment of alternative law enforcement mechanism” would the withdrawal of UPDF forces from Bunia be completed. (*Ibid.*)

604. Thus, in the Luanda Agreement even the DRC recognises that the UPDF, rather than encouraging violence and chaos, contributes to order in the Ituri region. Had the UPDF actually been the destructive force portrayed in the *Reply*, the DRC certainly would have insisted on the immediate withdrawal of Ugandan troops as the only means to bring peace to the area. At the very least, the DRC would have refused to execute an agreement expressly allowing Ugandan troops to remain in Congolese territory. But the DRC took exactly the opposite position in the Luanda Agreement, authorising and agreeing to the continued presence of the UPDF in the Ituri region of eastern Congo as a mechanism for maintaining order in the troubled region pending the creation and installation of a new and suitable security arrangement.

¹³⁰ MONUC had earlier, in February 2002 (*see* UR Annex 76), requested that UPDF troops which had already temporarily withdrawn from Bunia return to the city following an escalation of violence during the withdrawal. (*See supra*, paras. 598-600.)

E. Response To The DRC's Legal Arguments.

605. In approaching the legal principles allegedly violated by Uganda, the Respondent State has a problem of a general character. This stems from the fact that Uganda denies the allegations and, further, considers that the Claimant State has not satisfied the applicable standard of proof.

606. It must follow that there is not much value in an examination by Uganda of the quality and relevance of the legal principles set forth by the DRC in paragraphs 5.52 to 5.65 of the *Reply*.

607. As a matter of principle Uganda does not necessarily reject all the propositions of law offered by the DRC, though Uganda does reject the mode in which the DRC seeks to apply the legal principles.

608. In the light of the contents of the *Reply*, Uganda finds it necessary to repeat the conclusion reached in the *Counter-Memorial* that the DRC has not produced any reliable evidence of the responsibility of Uganda for the alleged violations of human rights. In this connection Uganda confirms the substance of Chapters VII and VIII of the *Counter-Memorial* relating to the serious inadequacies of the *Memorial* in matters of proof. The Court is respectfully referred to the passages at page 94 (paras. 153-55) of the *Counter-Memorial* and the contents of Chapter IX on the role of the political organs of the United Nations.

609. As the contents of Chapter V of the *Reply* indicate, the evidential problems remain unchanged. In particular, the DRC fails to produce evidence of imputability at the necessary standard.

610. In these circumstances Uganda reaffirms her position that the DRC has not satisfied the standard of proof required in establishing state responsibility in relation to the claims concerning violations of human rights. As the Court expressed the position in the *Corfu Channel* case (Merits) in reaction to the second alternative argument of the United Kingdom to the

effect that the minefield was laid with the connivance of the Albanian government:

A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here.

(I.C.J. Reports, 1949, p. 17.)

611. In paragraphs 5.14 to 5.20 the DRC invokes events said to have occurred in Kisangani “during the fighting between the Ugandan and Rwandan Armies in Kisangani in 1999 and 2000.” (DRCR, para. 5.14.) But issues arising out of these events are inadmissible in these proceedings, as Uganda explained in Chapter XV of the *Counter-Memorial*. In this connection Uganda finds it necessary to affirm her conclusions:

In the light of these various considerations, the Government of Uganda respectfully submits that the Court lacks competence to deal with the events in Kisangani in June 2000 in the absence of consent on the part of Rwanda, and, in the alternative, even if competence exists, in order to safeguard the judicial function the Court should not exercise that competence.

(UCM, para. 287.)

612. With respect to the references to the Geneva Conventions of 1949 and the Additional Protocols contained in Chapter V of the *Reply*, Uganda does not accept that the various incidents invoked by the DRC, assuming they can be proved, occurred in the context of an armed conflict. The DRC has made no effort to establish the existence of an armed conflict in the locations which are indicated in the *Reply*.

CHAPTER VI

REAFFIRMATION OF THE VALIDITY OF UGANDA'S COUNTER-CLAIMS

A. The First Counter-Claim: The DRC's Responsibility for Acts Committed By Armed Groups Sponsored Or Tolerated By Successive Congolese Governments

(1) *Introduction*

613. Since 1986, Uganda's single most important concern in her dealings with the DRC and her predecessor Zaire has been security along the two States' common border. Indeed, attacks on Uganda by various insurgent groups operating from eastern Congo have been a point of contention between the two States for almost all of the last 16 years.

614. Throughout this period, Uganda has consistently expressed her concern about this issue in meetings with Zairean/Congolese officials, and with the international community at large. The DRC's waiver arguments notwithstanding, it should therefore come as no surprise to the DRC that Uganda would file a counter-claim against Zaire's -- and later, the DRC's -- harbouring of these armed groups and unlawful use of force against Uganda.

615. In this section, Uganda will show that her first counter-claim is justified and that it is supported by the evidence, which clearly proves that both the governments of Presidents Mobutu Ssesse Seko and Laurent Kabila tolerated and supported anti-Uganda forces in violation of international law.

(2) *The procedural issues raised by the DRC*

616. In the *Reply* the DRC contends that, in spite of the Court's determination of the question of counter-claims, the issue of the admissibility of Uganda's counter-claims is still at large. (DRCR, paras. 1.32-1.39, 6.01.) This is not the first time that the DRC has offered unacceptable and bizarre opinions on the application of the provisions of the Statute of the Court.

The Court has made a definitive determination on counter-claims for the purposes of Article 80 of the Rules of Court and the matter rests there.

617. With the purpose of assisting the Court, the Government of Uganda will examine the DRC arguments insofar as they appear, in substance, to pertain to the merits. This represents the practical way forward.

(3) *The argument that the claims relating to the period prior to President Kabila's achievement of power in April 1997 are inadmissible*

618. This argument is presented in the *Reply*, paragraphs 6.03 to 6.15. It is entirely without merit. The DRC has presented no preliminary objection relating to this issue. Moreover, any such preliminary objection would have lacked merit because the Declarations of the Parties contain no reservations *ratione temporis*. (See Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. III, pp. 785-802; the *Mavrommatis Palestine Concessions* case, PCIJ., Series A, No. 2, p. 35.)

(a) In law, Uganda never waived its claim against Zaire

619. The *Reply* also advances the argument that Uganda has waived the claims relating to this period as a consequence of her conduct. (DRCR, paras. 6.04-6.15.) Uganda contends that the conditions for the existence of a waiver in general international law are not satisfied.

620. In the first place, at critical junctures the Government of Uganda made its attitude clear in response to the harbouring of armed bands and support for their activities by Zaire. (*Infra*, paras. 631-41.)

621. Secondly, the absence of protest does not, as a matter of law, validate illegal acts. It may be true that the Government of Uganda was not in all respects consistent in its conduct, but as Fitzmaurice has observed: "Too much account should not be

taken of superficial contradictions and inconsistencies.” (See Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. I, Cambridge, 1986, p. 175.)

622. In the third place, acquiescence is not to be presumed. (See *ibid.*, p. 174.) The DRC invokes the *Phosphate Lands* case. (DRCR, para. 6.12–6.13.) In that case, the Court faced a situation in which the contacts and representations were episodic, to say the least. The Court took a common sense and realistic view of the political circumstances, which involved gaps of many years between contacts. The Court set out the history (I.C.J. Reports, 1992, paras. 33-35), and concluded:

The Court, in these circumstances, takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru’s Application was not rendered inadmissible by passage of time. Nevertheless, it will be for the Court, in due time, to ensure that Nauru’s delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.

(I.C.J. Reports, 1992, para. 36.)

623. This decision related to admissibility, but was carefully based on the facts and the pertinent objection was not joined to

the merits. The rejection of this preliminary objection based on the alleged waiver by Nauru was by 12 votes to one.

624. The Court will take its own view of the evidence of the alleged waiver. In this respect the documents relied upon by the DRC appear to prove the opposite of the acquiescence. An example consists of the following (as presented in the *Reply*):

La renonciation de l'Ouganda peut non seulement être déduite de son silence circonstancié, mais aussi de certaines positions qu'il a adoptées à l'époque, in tempore non suspecto. Ainsi, en octobre 1996 encore, il est fait mention dans certains documents officiels ougandais du fait que certains des événements survenant au Zaïre durant cette période risquaient de "undermin[e] the cordial neighbourhood relationship." Un tel vocable cadre évidemment mal avec une quelconque prétention de mise en cause formelle de la responsabilité du Zaïre à l'époque. Dans ce contexte, il est particulièrement significatif de constater que, le 4 novembre 1996 à Kampala, le Président ougandais Yoweri K. Museveni et le Vice-Président rwandais Paul Kagame ont remis au Conseiller spécial en matière de sécurité de Mobutu, Honoré N'Gbanda Zambo Ko Atumba, un document en douze points à l'attention du Président Mobutu, de son Gouvernement et de l'Union européenne en vue d'ouvrir une négociation directe et immédiate pour un cessez-le-feu. Le point no. 10, de ce document est particulièrement pertinent pour la présente affaire. Il dispose que :

"Le Gouvernement zaïrois doit chasser les Interahamwe, les anciens dirigeants du Gouvernement rwandais et leurs militaires du

territoire zairois. Il doit éloigner de la frontière ceux des réfugiés rwandais qui refuseraient de quitter le Zaïre, et ce, conformément aux accords internationaux.”

Il est piquant de constater que dans ce document intitulé “Propositions du Rwanda et de l’Ouganda pour la paix (suggestion du Président Mobutu),” l’Ouganda, qui en était co-auteur avec le Rwanda, n’a fait aucune allusion à un éventuel soutien que le Gouvernement Mobutu apporterait aux rebelles ougandais pour en exiger la cessation. Aucune protestation ni revendication n’a, a fortiori, été avancée à cet égard. Il est exclusivement question de la cessation d’un prétendu soutien aux groupes armés rwandais hostiles au Gouvernement du Rwanda. A contrario, l’Ouganda exprime très clairement sa position en s’abstenant de formuler un quelconque grief à l’égard d’un éventuel soutien du régime zairois à des forces rebelles situées sur son territoire. Ce document est évidemment hautement significatif, puisqu’il exprimait les griefs officiels de l’Ouganda et du Rwanda à l’égard du Zaïre. Il suffit à montrer une très claire renonciation de l’Etat ougandais à vouloir engager la responsabilité du Zaïre pour ce qui fera l’objet, bien des années plus tard, d’une demande adressée à la Cour.¹³¹

¹³¹ “Uganda’s waiver of the claim can be deduced not only from its silence, but also from certain positions which it adopted at that time, in *tempore non suspecto*. Thus, in October 1996, certain Ugandan official documents mentioned the fact that certain events taking place in Zaïre during that period were likely to ‘undermine the cordial neighbourhood relationship.’ Obviously such a statement does not agree with the view that there was any

(DRCR, para. 6.07; footnotes omitted.)

625. This is a remarkable piece of reasoning. The document shows that Uganda and Rwanda considered that a serious and persistent public order problem existed and were employing diplomacy to seek to ameliorate the difficulties. The passage quoted by the DRC refers very clearly to these concerns. There is no waiver. When the document is read as a whole (DRCR Annex 100), it will be seen that the perspective is that of the maintenance of public order in the region, and such a perspective cannot be construed as a waiver of claims.

626. It is suggested that the absence of complaint to the Security Council is conclusive evidence of waiver. (DRCR, para. 6.08.) In response, Uganda would point out that it is not the case that a failure to address complaints to political organs is a cause of inadmissibility. Moreover, it is only on a few

formal invocation of Zaire's responsibility at that time. In this context, it is particularly important to note that, on 4th November 1996 in Kampala, Uganda's President Yoweri K. Museveni and the Rwandese Vice President Paul Kagame gave a twelve-point document to Honoré N'Gbanda Zambo Ko Atumba, Mobutu's Special Advisor on Security, addressed to President Mobutu, his Government and the European Union, with an aim of starting direct and immediate negotiations for a cease-fire. Point n°10 of this document is particularly relevant to the present case. It provides that:

'The Zairean Government must expel the Interahamwe, the former leaders of the Rwandese Government and their soldiers from Zairean territory. It must keep away from the border, all the Rwandese refugees who may refuse to leave Zaire, in conformity with the international agreements.'

It is noteworthy that, in this document entitled 'Rwanda and Uganda's proposals for peace (suggestions to President Mobutu),' Uganda, which co-authored it with Rwanda, did not make *any* reference to any support by Mobutu's Government to Ugandan rebels so as to demand for its cessation. No protest or claim was *a fortiori* presented in this regard. They only asked for the cessation of alleged support to the armed Rwandese groups that were hostile to the Government of Rwanda. Uganda did not present any complaint against any support by the Zairean government to rebel forces on its territory. This document is important, since it expressed Uganda and Rwanda's official complaints against Zaire. It suffices to show a clear waiver of the claim by the Ugandan State to hold Zaire responsible for what would become, many years later, a claim addressed to the Court."

occasions that the political organs address the legal issue of imputability. (UCM, paras. 196-206.)

627. A further line of argument adopted by the DRC involves reliance on the fact that in the period May 1997 to April 1998, that is, the post-Mobutu period, the conduct of Uganda involved a waiver because relations between the two States improved. (DRCR, paras. 6.10-6.15.) This reflects the realities of the diplomatic situation, but there is no evidence of a waiver of existing claims.

(b) In fact, Uganda never waived its claim against Zaire

628. The DRC's argument that Uganda waived her counter-claim targeting Zaire's unlawful use of force against her during the Mobutu era is also based on several key factual myths, all of which are belied by reality:

Myth: Uganda waived her counter-claim because Uganda never protested Zairean complicity to Zairean officials before 23 March 1999.

Fact: Uganda complained directly to Zaire in diplomatic notes as early as 1990.

Myth: Uganda waived her counter-claim because Uganda never protested to the international community.

Fact: Uganda complained to the international community loudly and often.

Myth: Uganda waived her counter-claim because Uganda's conduct led the DRC to believe that Uganda did not intend to hold her accountable for Zaire's aid to anti-Ugandan forces.

Fact: Uganda never signaled an intent to the DRC to forget the past.

629. A thorough analysis of the evidence will show each of these myths for what it is and that Uganda has never acted to undermine the viability of her counter-claim targeting the wrongs inflicted upon her by Zaire.

(i) *Uganda's conduct before the creation of the DRC did not involve the waiver of her claim against Zaire*

630. The DRC argues in the first instance that Uganda waived the portion of her counter-claim directed at the behaviour of the Zairean Government because Uganda supposedly failed to protest or object formally to Zaire's actions before 23 March 1999. (DRCR, para. 6.06.) Contrary to the DRC's assertions, however, Uganda was never silent in the face of Zaire's aggression. Indeed, the DRC's argument that Uganda never protested Zairean involvement in attacks against Uganda is nothing less than shocking in view of the facts.

631. In reality, Uganda repeatedly protested Zaire's passive -- and later, active -- support of anti-Uganda forces directly to Zaire and to the United Nations. (See, e.g., UCM Annex 1; UR Annexes 7, 10.)¹³² Initially, Uganda attempted to use diplomatic channels to address her security concerns with Zaire. In 1990, for example, Uganda strongly encouraged Zaire to take immediate action to increase security along their common border. (UCM Annex 1.) In a 6-page report entitled "Uganda/Zaire Matters of Security Concern to Uganda," the Hon. Amama Mbabazi detailed dozens of attacks against Ugandan nationals, identifying the persons involved, the dates of the attacks and the circumstances of the attacks. (*Ibid.*) Perhaps most importantly, the report contains a section entitled "Ugandan Dissidents in Zaire." In that section, Mr. Mbabazi identified each known Ugandan rebel group based in eastern

¹³² Many other examples exist. (See, e.g., UR Annexes 13, 14, 15.)

Congo, the location of its headquarters in Congo and the names of its leaders.

632. The 1990 report also contains a separate section entitled “Collaboration Between the Dissidents and Zairean Authority.” There, Mr. Mbabazi described, among other events, a meeting on 1 June 1990 chaired by Zairean Major Tambwe and attended by several anti-Uganda rebels. The meeting was held at Mutawa military barracks in eastern Zaire to “discuss a strategy for fighting the NRM [National Resistance Movement, *i.e.*, the Ugandan] Government.” (*Ibid.*, p. 5.) Not surprisingly, within sixty days of that meeting, groups under the leadership of the anti-Uganda rebels who had attended launched three separate attacks against Ugandan military posts and an electricity substation. (*Ibid.*, p. 6.) After each attack, the rebels retreated into Zaire. Despite requests from the Government of Uganda, Zairean authorities refused to extradite the rebels even though Uganda specifically identified the perpetrators and the location of their hideout in Zaire. (*Ibid.*, p. 6.)

633. Since Uganda’s protests to the Zairean Government fell on willfully deaf ears, Uganda took her complaints about Zairean aggression, including Zaire’s alliance with Sudan in support of anti-Uganda rebels, to the international community. (*See, e.g.*, UR Annexes 7, 10, 13, 14, 15.) The following are just some examples of Uganda’s repeated protests of Zairean aggression:

634. **Letter of 12 June 1996.** On 12 June 1996, Uganda submitted a formal protest letter to the Security Council complaining about a 26 April 1996 attack in Kisoro, Uganda. Uganda initially sent a protest note to Zaire regarding this attack but, having received no response, Uganda submitted her protest to the Security Council. In particular, Uganda charged:

It is equally important to note that on 26 April 1996 a group of Ugandan dissidents led by one Haji Kabeba based in Zaire attacked Kisoro, in south-western Uganda, through Busanza and killed three Uganda People’s Defense Forces (UPDF) soldiers,

two soldiers' wives and one child. This group was repulsed, seven of the bandits were killed and three captured alive. Information gathered from those who were captured revealed that they were linked to the Sudan-based West Nile Bank Front of Juma Oris. We indeed issued a statement condemning this unprovoked attack and have since sent a note of protest to the Government of Zaire who has not responded to date.

(UR Annex 7.)

635. **Letter of 12 December 1996.** Uganda again protested Zairean complicity in attacks launched by anti-Uganda rebels in a letter to the Security Council dated 12 December 1996. In that letter, Uganda complained that forces originating from inside Zaire had invaded on 13 November 1996 and attacked the Ugandan town of Mpondwe. In particular, the letter protested:

On 19 November 1996, the Ugandan border town of Mpondwe was shelled by forces from the Zairean border town of Kasindi. During the shelling some armed groups from inside Zaire attempted to re-enter Uganda's territory. UPDF again responded by destroying positions that the invading forces were using for launching their attacks against Uganda territory.

(UR Annex 10, p. 2.) Uganda's letter further alleged Zairean complicity in attacks against Rwanda, as well as her responsibility for attacks against Uganda:

After the 1994 genocide in Rwanda, the defeated Rwandan soldiers and the Interahamwe camped along the Zaire-Rwanda border (two miles inside Zairian

territory) with all the military hardware they carried from Rwanda.

... For two years, Zaire continued harbouring armed elements who regularly made cross-border attacks against Rwanda, causing perpetual threat to international peace and security in the region.

....

... Ugandan dissidents have been living in Zaire, with the full knowledge of the Zairian authorities. These have taken advantage of the prevailing situation and attacked Uganda from Zairian territory. ... Zaire should muster the courage and acknowledge the fact that the problem within eastern Zaire is a result of its own oppressive policies against a section of its citizenry.

(*Ibid.*, pp. 2-3.)

636. There are many other examples of such protests. (*See supra* para. 631, n.131.) In light of the above, however, it is unmistakably clear that Uganda was consistent in raising before the international community the suffering inflicted upon her by attacks launched from within Zaire.

637. In addition to protesting attacks from anti-Uganda rebels, Uganda also repeatedly protested Zaire's joint efforts with Sudan to destabilise Uganda, including their collaboration in supporting rebels launching attacks from Zaire into Uganda. For example, in 1997, Uganda alerted the United Nations that:

On 12 October 1996 rebels of the West Nile Bank Front (WNBF) estimated at about 120 and commanded by "Captain" Moro sprang from their base in Kaya in the Sudan, moved through Zaire and entered Uganda through Simbiri on the north-eastern border of Zaire with Uganda. Later, the rebels attacked the

Uganda People's Defence Forces (UPDF) position at Maracha. The group was badly beaten and retreated back into Zaire.

(UR Annex 15, p. 3.)

638. It is thus clear that far from remaining silent in the face of destabilising acts emanating from Zaire, Uganda was consistent in attempting to raise the problem first with Zaire herself and then with the international community as a whole. Accordingly, there is no argument that Uganda's "silence" somehow waived her claims against the DRC concerning the acts of her predecessor State.

639. Conclusive proof that Uganda repeatedly protested to both Zaire and the United Nations comes from the DRC itself. In the *Reply*, the DRC relies upon her 1 December 1996 protest letter to the United Nations to support her unfounded claim that Zaire, not Uganda, was a victim of aggression. (DRCR, paras. 6.08, 6.20.) While the DRC's letter falls well short of showing Ugandan "aggression," it flatly contradicts the DRC's argument that Uganda never protested Zaire's support of anti-Uganda rebels. In fact, the very purpose of Zaire's 1 December 1996 letter was to *respond* to Uganda's accusations of Zairean support for anti-Uganda rebels. It states:

4. Notwithstanding the allegations that the repeated incursions of the Ugandan army against Zairian territory represent the right of pursuit against supporters of the Democratic Allied Front [ADF], a Ugandan rebel movement *which is alleged to be supported by the Zairian authorities....*

....

6. Besides, the government would like to deny categorically that it is supporting ADF which is totally known in Beni and Kasindi, the Zairean government has neither given support nor recognition to any Ugandan rebel movement and does not know the

Allied Democratic Front whose action would have led to, according to Ugandan sources, the right of hot pursuit on the Zairean territory. It does not entertain nor has it authorized any base for Ugandan Moslem rebels on its territory. The occupation by the Ugandan troops of the towns of Kasindi and Beni together with the statements by the spokesman of the Ugandan army confirming that the Uganda troops would stay on the Zairean territory until the Zairean government stops supporting the Uganda Moslem rebels in the border area and re-establishes its authority in that region is a pretext to justify non provoked aggression against the Republic of Zaire....

....

9. The government of the Republic of Zaire calls upon the serious attention of the Security Council and the Secretary General of the United Nations on the seriousness of the facts highlighted above.

(DRCR Annex 39 (U.N. translation); emphasis added.) The DRC's contention that Uganda failed ever to raise the issue should be dismissed as the nonsense it is.

(ii) *Uganda's conduct after the creation of the DRC did not waive her claim against Zaire*

640. Intent on maintaining her waiver argument in the face of the facts, the DRC next argues that Uganda's behavior in the post-Mobutu era constitutes a waiver of her right to invoke Zaire's international responsibility. (See DRCR, paras. 6.10-6.15.) Like the others before it, this argument too can be readily dismissed. Indeed, Uganda's conduct following the creation of

the DRC only *confirms* her intent to retain her rights arising from attacks by anti-Uganda forces during the Mobutu era.

641. The DRC's first line of argument is to suggest that Uganda's prior support to Laurent Kabila's AFDL movement involved the waiver of her claim against Zaire. Yet, the evidence clearly shows that a key reason Uganda lent limited moral and political assistance to the AFDL in 1997 was to improve security along Uganda's border with Zaire. (*See UCM Annex 42, p. 14.*) Prior to taking power, Mr. Kabila had assured President Museveni that, if he was successful in capturing power, his new government would work side-by-side with Uganda to bring peace and stability to the border area. (*See ibid.*) Moreover, once Mr. Kabila took power in Kinshasa, Uganda's contacts with the new government were likewise focused on securing order in the border region.

642. In fact, Uganda made border security the most important issue in the bilateral meetings between the two States. For example, the two States held at least two high-level meetings to discuss Uganda's border security concerns, the first on 10 to 13 August 1997 in Kinshasa, and the second on 6 to 7 April 1998 in Kampala. (*UCM Annex 19; UR Annex 18.*) During those meetings, Uganda insisted that the DRC commit to taking specific steps to address Uganda's security concerns. Uganda was particularly worried because many of the same individual antagonists from the Mobutu era were still in eastern Congo assisting anti-Uganda rebels. (*UR Annex 19, p. 2; Annex 23, para. 7.1.2.*) Thus, far from taking border security issues off the table, Uganda made very clear that they remained her number one priority.

643. The DRC next argues that the 27 April 1998 Protocol constituted a renunciation of Uganda's claim against Zaire. (*DRCR, paras. 6.11-6.13.*) This contention is spurious. In fact, the Protocol was simply a proactive step toward addressing security problems that had their origin during the Mobutu era, but that continued to plague relations between the two States. Read objectively, the Protocol simply shows what Uganda has repeatedly observed -- that border security was a key issue for her. It was another in a series of important steps intended by

Uganda to make the DRC Government address the security problems created and exploited by her predecessor.

- (4) *Uganda's counter-claim concerning Zaire's wrongful use of force against Uganda is fully supported by the evidence.*

644. As an alternative to her waiver argument, the DRC makes a half-hearted attempt to suggest that even if Uganda has not waived her counter-claim arising from Zaire's historical conduct, the counter-claim is not supported by the facts because (1) Uganda supposedly does not have sufficient proof, and (2) it was Zaire, not Uganda, that was the victim of aggression.

645. Uganda's counter-claim is fully supported by the evidence and is *not* (as the DRC suggests) "*contredite par les sources neutres et indépendantes*."¹³³ (DRCR, para. 6.17.) In fact, the DRC conspicuously fails to identify any source to support her argument that "neutral" sources have "refuted" Uganda's claim. In contrast, Uganda's counter-claim is supported by numerous sources that are both individually and collectively reliable.

646. At the outset, it must be pointed out that the DRC's own admissions provide *prima facie* proof of Uganda's counter-claims. As observed in Chapter II, *supra*, the DRC has admitted that various anti-Uganda rebel groups have operated in eastern Zaire/Congo since at least 1986, often with the assistance of Sudan. (*See, e.g.*, DRCR, paras. 3.10, 3.15, 3.16, 3.19, 3.21, 3.22.) Moreover, nowhere in any of the DRC's numerous filings with this Court does she identify a single step that the Zairean Government took to prevent the attacks committed by these groups against Uganda. Together, these two facts -- the admitted presence of anti-Uganda rebels in the DRC and Zaire's failure to take any meaningful steps to expel them -- are dispositive on the question of Zaire's international legal responsibility.

¹³³ "refuted by the neutral and independent sources."

647. As the Court is well aware, in order to prevail on her counter-claim concerning Zaire's wrongful use of force, Uganda need only show Zairean acquiescence in the use of her territory by anti-Uganda forces attacking Uganda. (*See supra*, Ch. III, para. 241.) She need not show command and/or control. Accordingly, the DRC's own admissions present a *prima facie* case in favour of Uganda.

648. In addition to this *prima facie* case, there is substantial additional evidence proving that Zaire both tolerated and directly supported anti-Uganda rebels operating from her territory. The evidence shows that far from being the victim of a fictitious Ugandan aggression, Zaire was the real aggressor against Uganda.

(a) Uganda-Zaire relations were never cordial

649. The DRC's assertion that relations between Uganda and Zaire were warm until "*l'intervention de l'Ouganda dans les affaires intérieures de l'Etat zairois*"¹³⁴ is absurd. (DRCR, para. 6.18.) From the time President Museveni came to power in 1986 at the conclusion of a successful popular uprising against an entrenched dictatorship, the relationship between Uganda and Zaire was unfriendly. The tense relationship between the two States emanated in part from President Mobutu's fear that Uganda's example might inspire the Congolese people to rise up against their own entrenched dictatorship. Uganda's rapid economic growth after 1986, compared with Zaire's decline, exacerbated President Mobutu's preoccupation with the example his smaller neighbour was setting. Finally, while President Museveni was increasingly hailed by the international community as the standard-bearer of enlightened new generation of leaders in Africa, President Mobutu was increasingly regarded, and treated, as a pariah. His resentment fermented for years, and led him to give sanctuary to the Ugandan Government's enemies, and later, to provide military assistance to them. Zaire also formed an alliance with Sudan to destabilise Uganda, their common enemy.

¹³⁴ "Uganda's intervention into Zaire's internal affairs"

650. The best “evidence” the DRC can identify in support of her assertion that the two States enjoyed good relations is a passage in President Museveni’s autobiography in which he refers to his first meeting with President Mobutu immediately following President Museveni’s inauguration in 1986. The problem with the DRC’s use of this passage is that it is incomplete and is taken out of context. When read in its entirety, the text clearly shows that President Museveni was wary of President Mobutu and feared the Zairean leader would assist rebel groups against Uganda’s new government. (UR Annex 11, p. 172.) Including text that was omitted by the DRC in italics, President Museveni actually wrote:

Immediately after the swearing-in, I had to go the same day to Goma, in Zaire, to attend a meeting which President Mobutu had called. His motive for inviting us was not entirely clear. Perhaps he was worried by the force of example – the people of Uganda overthrowing the established order by a popular revolution. He may have wished to appear to be a patron of the changes that were going on. I myself was not entirely confident of President Mobutu’s acceptance of our regime

It was a short, courtesy meeting and I was soon back in Uganda for we still had to carry on fighting in the east and in the north of the country... The 21st [battalion] had remained in Kasese because at the time there was still a danger of Zaire intervening in the war against us.

(Ibid.; emphasis added.)

651. By 1994, relations between Uganda and Zaire had soured dramatically. Uganda and the rest of the international community were outraged by President Mobutu’s active support for the thousands of ex-FAR and Interahamwe militia fighters who had taken refuge in Zaire after participating in the

slaughter of more than 800,000 Rwandese Tutsis. President Mobutu not only received these génocidaires with open arms, but he also allowed them to re-arm and to remobilise for attacks both against Rwanda and the Congolese Tutsi population. (UCM Annexes 8, 9, 21, 42; UR Annex 8.)¹³⁵

(b) Zaire was considered a source of regional instability

652. Contrary to the DRC's arguments, President Mobutu's Zaire was never viewed by the international community as the victim of anyone's aggression, least of all Uganda's. As just indicated, the Mobutu regime was widely viewed by the international community as an agitator of regional instability and ethnic unrest. (UR Annexes 6, 8.) In fact, the Embassy of Uganda in Kinshasa even discovered hand-written documents by President Mobutu himself approving a plan to assassinate President Museveni. (UR Annex 87, para. 14.)

653. Zaire's purported December 1996 protest of Ugandan "aggression" to the United Nations was a thinly veiled effort by President Mobutu to deflect criticism of his blatant efforts to rekindle the Rwandan ethnic warfare and to destabilise the region. (DRCR, paras. 6.08, 6.20 & Annex 39.) Indeed, Zaire's letter exposed the poor relations between the two States and Uganda's strong belief that Zaire was actively supporting anti-Uganda rebels. (DRCR Annex 39.)

654. Notably, the only fallout from Zaire's December 1996 letter was *increased pressure on President Mobutu* by the United Nations and member States to institute democratic reforms and to participate in diplomatic efforts to address the security concerns of his neighbours. (See DRCR Annex 101.)

¹³⁵ (See also UR Annex 6, pp. 14, 20, 42.)

(c) The evidence shows that Zaire was involved in armed attacks against Uganda

655. The *Reply* argues that Uganda has not offered sufficient evidence to establish the link between the Mobutu regime and the anti-Uganda rebels based in Zaire. This argument can be disposed of quickly. First, as previously mentioned, Uganda need not show that Zaire participated in each and every attack against Uganda to establish State responsibility on this portion of her counter-claim. It is enough under international law to show that the attacks emanated from the territory of Zaire with the knowledge of the Zairean government. Nevertheless, as discussed below, the evidence offered by Uganda does much more than show knowledge; it shows active collaboration between the Mobutu regime and anti-Uganda rebels that is inconsistent with the most basic norms of international law.

656. Moreover, beyond baldly asserting that Uganda has failed to prove the connection between the Zairean Government and anti-Uganda rebels, the *Reply* does not bother to contest the considerable evidence Uganda offered on this score in the *Counter-Memorial*. (DRCR, para. 6.17.) As a result, the DRC has effectively conceded the force of that evidence. (UCM, paras. 15-23; *see especially* UCM Annexes 60, 62, 63, 65.) Rather than revisit that evidence here, Uganda thus incorporates it by reference.

657. The connections between the Mobutu regime and anti-Uganda elements are further underscored by additional evidence to which Uganda would like to draw the Court's attention. First, the Court is familiar by now with the name Mathias Ebamba, the FAZ and FAC officer charged with the responsibility of coordinating between the Congolese Government and the anti-Uganda rebels. In Chapter II, Uganda reproduced a letter from the ADF's commander to Col. Ebamba. (*See supra*, para. 70; UR Annex 21.) Aside from showing the re-initiation of contacts between the DRC and the ADF, the letter testifies to the close connection to the rebels that existed when Col. Ebamba served under President Mobutu:

Dear sir since we heard that you were admitted this way again, we were so glad to had that news because we still hope that you never change your mind even if you are in another regime by now.

On our side we still continue with our struggle of liberating our mother country 'U' therefore we are in much need of your help if you never change your mind. We still beleave that you're our father and we can't forget these you did for us and we're praying to God to reward you a good success in all your jobs.

(UR Annex 21.)

658. The close relations between the Zairean Government under President Mobutu and the ADF are also shown by the statement of Hajji Sadat, former Director of Records of the ADF. In his signed declaration, he testified:

In 1994, the UDPF attacked a training camp in Busemka and overan it causing survivors to desperse into areas of Lake Albert in the Eastern part of Uganda and later on regrouped in the Eastern part of Congo.

The group later surrendered to the local authorities in Bunia who later handed the same group over to the provincial heads.

In Bunia the group allied with ...the Congolese army which later introduced them to the Central government which then ordered for the faciliation of the group on all ways.

....

In the talks on the Zairean (Congolese) government were Gen. Eluki and Col. Ibamba.

While on the ADF side were Lubinga Moses, the Cobra (Obad Abahallah Birongi and Kimeewa Kasangaki (Swaib Kigozi).

From these Contacts and meetings the following resulted:

- The Kasindi border post was to be used as the entry port for the recruits from Kampala who would be heading to the ADF bases in Zaire (Congo). The post was manned by military personell and immigration officials who could arrange for the safe passage to the mountains.
- Ground bases were provided in the northern Kivu region in areas like Beni, Kasindi, Lugetse among others.
- Also provided was the security to officers and equipment which could be moving from one place to another especially between Kampala and Beni. Others could be from Sudan to the DRC.
- The Zairean government also provided free air space and ground for all operations for the ADF.
- Funds from the Zairean government for the ADF were also released to the external wing mainly in Nairobi.
- An assortment of arms was also despatched by the Zairean government for the ADF.

(UR Annex 85; *see also* UR Annex 20, p. 2.) Thus, the evidence points to one conclusion -- that Zaire and the anti-Uganda forces were in active collaboration to destabilise Uganda.

659. Indeed, officials of the DRC Government have frankly admitted these facts in meetings with Ugandan colleagues. For example, in a security meeting with Ugandan officials in May 1998, the Governor of North Kivu Province in the DRC acknowledged that “NALU [an anti-Uganda rebel group] had the support of the Mobutu regime and took their members from the Congolese youths.” (UR Annex 25, p. 1.)

660. In addition to showing that Zaire collaborated generally with anti-Uganda forces operating from her territory, the evidence also shows Zairean involvement in particular attacks against Uganda, including the 13 November 1996 attack on Mpondwe. (*See* UCM, para. 388.) Although the DRC claims that the *Counter-Memorial* presents insufficient evidence to link Zaire to the Mpondwe attack (DRCR, paras. 6.26-6.31), her argument is off the mark. Uganda offers several separate, credible sources of evidence to support her claim.

661. The first is the statement of the ADF Chief of Staff recorded by the UPDF 55th battalion in Lhume, DRC on 17 April 2000. (UCM Annex 60.) This document reflects intelligence information gathered from a high-ranking official within the ADF who quite clearly had first-hand knowledge of ADF operations. The DRC’s criticism of this evidence rests on the fact that the statement is not signed and dated. However, it is important to note that this document was not prepared by lawyers or in anticipation of litigation, but rather for UPDF internal intelligence use to better address the continuing threat caused by ADF and its supporters.

662. The second source is an official Ugandan Government report prepared by the Ministry of Foreign Affairs that describes in detail the threats to Uganda’s security emanating from eastern Congo. (UCM Annex 31.) The DRC gives no meaningful response to the facts contained in this document except to harp on a minor discrepancy in the number of people

Uganda claims were killed in the 13 November 1996 attack on Mpondwe, and to proffer conflicting testimony from Col. Ebamba. (DRCR, para. 6.27.) Neither of these criticisms is significant. Although there is some discrepancy concerning the number of casualties in the Mpondwe attack, it is undisputed that at least 20 Ugandan citizens lost their lives. As for Col. Ebamba's self-serving denial that Zairean forces were involved in the attack, it is as predictable as it is unreliable.

(5) *The evidence supports Uganda's counter-claims concerning the period from May 1997 through the 2 August 1998 rebellion by Congolese army units against President Kabila*

663. The *Reply* argues that Uganda lacks evidentiary foundation to support her claim that the DRC Government under President Laurent Kabila aided and abetted anti-Uganda forces prior to August 1998. Apparently, only authenticated documents penned by President Kabila himself would satisfy the DRC. In the real world of international politics and conflict, and taking account of the DRC Government's obvious desire to keep its intrigues secret, Uganda has provided more than enough evidence to prove a violation of international law.

(a) Relations between Uganda and the DRC deteriorated in 1998

664. To support her argument that she had no motive to assist anti-Uganda forces, the DRC argues that the two States enjoyed good relations until August 1998. (DRCR, para. 6.36.) Uganda does not deny that her relations with President Kabila's new government, started out well, and that in the beginning the DRC Government cooperated with Uganda in efforts to secure the border areas where anti-Uganda rebels operated. However, the DRC's cooperation ended in mid-1998, when President Kabila turned against Uganda (and Rwanda) and made alliances with their enemies, including the ADF and the Government of Sudan. (See UCM, paras. 33-51; *supra*, Ch. II, paras. 64-88.) Rather than recapitulate material already presented both in the *Counter-Memorial* and earlier in this *Rejoinder*, Uganda merely

reminds the Court that the DRC herself has admitted to this change in strategic direction and military alliances. (*Supra*, paras. 82-86.) According to one of the most oft-cited sources in the *Reply*, the relations between Uganda and the DRC deteriorated, and:

This deterioration was caused by three issues: Kabila's quest for regional leadership, *his tolerance of rebel groups aiming to destabilize the governments of his neighbours on the DRC territory* and his unwillingness to co-operate on economic projects.

(*How Kabila Lost His Way, supra*, p. 21; emphasis added.) Thus, the contention in the *Reply* that the two States enjoyed good relations all the way through August 1998 is ridiculous.

- (b) The evidence supports Uganda's counter-claim that the DRC aided anti-Uganda forces before 2 August 1998

665. As set forth in detail in Chapter II, *supra*, there is abundant evidence that as President Kabila turned away from Uganda, he embraced both the anti-Uganda forces based in eastern Congo and the Government of Sudan. Rather than renew that discussion here, Uganda incorporates herein her presentation of evidence set forth in paragraphs 64 to 88 of this *Rejoinder*. In Chapter II, the evidence was presented in the context of Ugandan's contention that her actions constituted lawful self-defence. To establish DRC state responsibility in the very different context of Uganda's counter-claim, however, requires only that Uganda show that the DRC Government knew about and acquiesced in the activities of the anti-Uganda forces operating from Congolese territory.

- (c) The evidence supports Uganda's claim that the Congolese authorities were involved in particular attacks against Uganda

666. The DRC's argument that Uganda cannot prove her involvement in particular attacks against Uganda must be rejected. As a threshold matter, Uganda need not show direct Congolese support in each and every rebel attack to establish liability on her counter-claim. As shown in the *Counter-Memorial* and earlier in this *Rejoinder*, President Kabila and his government were coordinating closely with the anti-Uganda rebels prior to August 1998. As a result, the actions of the rebels, whether or not there was direct Congolese involvement in particular attacks, are attributable to the DRC Government.

667. Moreover, the evidence clearly suggests direct Congolese participation in some of the rebels' attacks, including the attacks on Kichwamba Technical College on 8 June 1998 and on Kasese on 1 August 1998. The DRC's criticisms of the evidence fail when the facts are viewed in their entirety. The DRC admits that both the Kichwamba Technical College and the Kasese attacks were carried out by the ADF. At least three high-ranking Congolese army officers, Col. Ebamba, Col. Mayala, and the Brigade Commander in Bunia were facilitating contacts between the ADF and the DRC Government in connection with these attacks. (UCM Annex 20, p. 3.) After the attacks, the perpetrators returned to their bases in Congo, but no effort was made by Congolese authorities to arrest them or otherwise hold them to account.

(6) *The evidence supports Uganda's counter-claims covering the period after 2 August 1998.*

(a) The law

668. The *Reply* contains the following argument:

*La demande reconventionnelle vise encore le soutien que la RDC aurait apporté aux rebelles ougandais après le 2 août 1998. Cet aspect de la demande est, juridiquement, fort différent de ceux qui ont été traités ci-dessus. Quels que soient les faits qui pourraient être établis, il va en effet de soi que la RDC ne pourrait voir sa responsabilité engagée pour un soutien accordé en réaction à l'agression armée dont elle a été victime de la part de l'Ouganda.*¹³⁶

(DRCR, para. 6.48.)

669. This argument is then restated, but without substantial change, in the two paragraphs that follow. (DRCR, paras. 6.49-6.50.) In response to this argument, Uganda would accept that in appropriate circumstances, such action would in principle constitute a form of lawful self-defence.

(b) The facts

670. Although, as just observed, Uganda accepts the DRC's contention that in proper circumstances aid to rebel forces can constitute a form of lawful self-defence, the particular circumstances of this case do not justify the DRC's aid to the

¹³⁶ "The Counter-claim is also directed at the DRC's support to Ugandan rebels after 2nd August 1998. This aspect of the Counter-claim is legally very different from those that we have dealt with above. Whatever the facts that may be established it goes without saying that the DRC cannot be held responsible for support provided *as a response* to the armed aggression which it was being subjected to by Uganda."

ADF and other anti-Uganda insurgent groups. Put simply, the DRC cannot show that her aid to these rebels was a *response* to the “armed aggression” of Uganda. To the contrary, as Uganda painstakingly showed in both the *Counter-Memorial* and again in Chapter II above, the DRC’s military alliances with the ADF and Sudan, and the activities of all three in furtherance of that alliance, *preceded* Uganda’s decision, on 11 September 1998, to send her army into Congo against the DRC’s new allies. Thus, it was Uganda that was subject to the first armed aggression from the DRC. (UCM, paras. 33-51; *supra*, Ch. II, paras. 64-88.)

671. The *Reply* argues that Uganda has not proved the Congolese involvement in specific attacks after 2 August 1998, but makes only desultory attempts to undermine Uganda’s evidence on this score. (DRCR, paras. 6.59-6.62.) Yet, this effort, directed at bringing out certain minor date discrepancies, cannot obscure the facts so clearly set out in the *Counter-Memorial* and the Annexes thereto. (See UCM, paras. 54, 95-97 & Annexes 51, 54, 67.)

672. Indeed, the *Reply* essentially admits the DRC’s cooperation with anti-Uganda forces after 2 August 1998 in its Chapter III. In that Chapter, the DRC attempts to discredit Uganda’s abundant evidence of collusion between the DRC Government and the anti-Uganda rebels in the period before the 2 August 1998 rebellion. (DRCR, paras. 3.75-3.77.) A principal strategy is to argue that Uganda’s evidence only shows collaboration *after* 2 August, not before. (*Ibid.*) Even if this argument were true (which it is not), it would still confirm Uganda’s position that the DRC was indeed working hand-in-hand with the anti-Uganda elements after 2 August 1998. Consequently, in her own discussion of Uganda’s proof, the DRC has effectively admitted the facts supporting this element of Uganda’s claim.

673. Finally, additional proof of the collaboration between the DRC and the anti-Uganda forces were provided in the statement of ADF officer Hajji Sadat, cited above. (*Supra*, para. 72.) He declared:

Even after the fall of Mobutu the same arrangements were maintained for example in October and September 1999 two flights were allowed to originate from DRC and drop arms to ADF bases.

Also arms under the same arrangement were from Sudan through the DRC up to the ADF bases.

Also an office was put in place in Kinshasa to cater specifically for the ADF operations against the Ugandan government.

The Kinshasa government had also organised for recruits for ADF from Somalia who would pass through Kinshasa and then be passed over to the ADF bases.

(UR Annex 85.)

* * *

674. As the above discussion makes clear, Uganda has been subjected to uninterrupted cross-border attacks from hostile armed bands of irregulars based in Congolese territory since at least 1986. For almost all of that period, those attacks have been carried out with the knowledge, acquiescence, complicity and/or active assistance of whichever government has been in power in Kinshasa. Uganda is thus entitled to judgment on this element of its counter-claim, and to reparation in an amount to be determined at a later stage in these proceedings.

B. The Second Counter-Claim: The DRC's Responsibility for the Attack On The Ugandan Embassy, And The Inhumane Treatment Of Ugandan Diplomatic Personnel And Other Ugandan Nationals.

- (1) *First basis of claim: Article 22 of the Vienna Convention on Diplomatic Relations (inviolability of the premises of the Mission)*

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

675. Both the DRC and Uganda have ratified the Vienna Convention on Diplomatic Relations. In any event the content of Article 22 is declaratory of general international law. In the words of one authority:

Inviolability in modern international law is a status accorded to premises, persons or property physically present in the territory of a sovereign State but not subject to its jurisdiction in the ordinary way. The sovereign State -- under the Vienna

Convention the receiving State -- is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises, persons or property. The receiving State is also under a positive duty to protect inviolable premises, persons or property from physical invasion or interference with their functioning and from impairment of their dignity.

(Eileen Denza, *Diplomatic Law*, 2^d ed., Oxford, 1998, p. 112.)

676. Since August 1998, the DRC Government has intentionally and systematically ignored these legal obligations by:

- (i) Permitting the FAC to storm the Ugandan Chancery on 11 August 1998, threatening the Ugandan Ambassador and others at gunpoint, and stealing money;
- (ii) Permitting the FAC to break into and enter the Ugandan Chancery and the Official Residence of the Ugandan Ambassador in September 1998, once more stealing property, including four Embassy vehicles;
- (iii) Permitting the FAC again to seize and occupy the Chancery and Official Residence in November 1998, yet again taking money and property belonging to Uganda; and
- (iv) Permitting the FAC to *continue* occupying the Embassy and Official Residence even now.

(UCM paras. 398, 400-01 & Annexes 23, 33, 87, 89, 92; UR Annexes 87, 88.)

677. The DRC does not have the audacity expressly to deny any of these facts, including the attacks on the Embassy on 11

August and in September 1998. Nor could it plausibly do so. Instead, the DRC attempts to deflect the Court's attention by creating the pleasant fiction that the Chancery and Official Residence have been open and available to Ugandan authorities for their official use at all times. Indeed, the DRC goes so far as to write:

*[La RDC] n'a jamais non plus adopté aucun acte officiel ni aucune mesure qui laisserait penser que les bâtiments diplomatiques ougandais situés à Kinshasa auraient fait l'objet d'une appropriation de la part de l'Etat congolais, ou que ces bâtiments ne seraient plus accessibles aux diplomates ougandais.... En réalité, il suffit aux autorités ougandaises d'en manifester le souhait pour qu'elles reprennent possession de l'un et l'autre de ces immeubles qui demeurent à leur entière disposition.*¹³⁷

(DRCR para. 6.92.)

678. As Uganda has highlighted throughout this *Rejoinder*, the *Reply* is nothing if not creative in its treatment of the facts. However, the DRC's creativity cannot obscure her recent admission that the Embassy is *not* at Uganda's disposal. Pursuant to the Luanda Agreement of 6 September 2002, a joint delegation of Ugandan and Congolese officials visited the Chancery and Official Residence on 28 September 2002. The Status Report from that visit, *signed by agents of both Uganda and the DRC*, states flatly: "At the time of the inspection, both premises [*i.e.*, the Chancery and Official Residence] were occupied." (UR Annex 88, p. 3.) This continued occupation

¹³⁷ "Neither has [the DRC] ever adopted any official stand or measure that would make anyone think that Uganda's diplomatic buildings in Kinshasa had been appropriated by the Congolese State, or that these buildings were no longer accessible to the Ugandan diplomats.... The truth is, it suffices for the Ugandan authorities to decide to take possession of these buildings, which are still at their full disposal."

negates the DRC's assertions in the *Reply* that the buildings “demeurent à leur entière disposition.”¹³⁸ (DRCR, para. 6.92.)

679. In addition to finding the Embassy and Official Residence still occupied, the joint delegation also found the buildings in a state of total disrepair. (UR Annex 88, p. 2.) It will thus require a substantial investment of time and money before Uganda can reassume full operational control over her property.

680. Moreover, the joint delegation also reported (and the DRC thus also admitted) that it “did not find *any* movable property belonging to the Uganda embassy or its former officials.” (*Ibid.*; emphasis added.) This missing property includes Ambassador Bataringaya's locked file cabinets containing sensitive intelligence documents and four Embassy vehicles as well as all other furniture, office supplies, work-related documents, and personal belongings left behind by the Ugandan diplomats when they were forced to abandon the premises in 1998. (UCM Annex 92; UR Annex 87, para. 11.) These facts, now admitted by the DRC, expose the mendacity of her assertion that: “*Depuis le départ des diplomates ougandais, la RDC a, dans la mesure de ses moyens étant donné la situation de guerre, assuré la sécurité des locaux diplomatiques ougandais à Kinshasa.*”¹³⁹ (DRCR, para. 6.94.)

681. It would, of course, be impossible for the DRC Government to claim ignorance of these repeated and continuing violations of the international norms relating to Uganda's diplomatic property. Uganda has repeatedly protested the invasions, use and occupation of her Embassy and the Ambassador's residence. (UCM Annexes 33, 87.) Yet, not once has the DRC responded to Uganda's protest letters; nor has she ordered the occupiers to vacate the buildings.

¹³⁸ “still at [Uganda's] full disposal”

¹³⁹ “Since the time when the Ugandan diplomats left the country, the DRC, using its available means given the situation of the war, ensured the security of the Ugandan diplomatic premises in Kinshasa.”

682. Indeed, the DRC's behavior is particularly shocking in light of the recent Luanda Agreement. As alluded to above, the Agreement expressly contemplates the visit of a Ugandan delegation to Kinshasa to assess the Embassy and begin preparations for its re-opening. (UR Annex 84, Annex A, p. 1.) The DRC Government thus had weeks of advance knowledge during which to order the evacuation of the buildings prior to the arrival of the Ugandan delegation. Nevertheless, she did not do so. (UR Annex 88, p. 3.)

683. It should also be noted that in the *Reply*, the DRC does not challenge the entitlements of Uganda in this respect.

684. The local remedies rule does not apply to cases of direct injury to the State of Uganda, and breaches of the obligations relating to diplomatic premises constitute classical examples of direct injury. This principle has not been challenged in the jurisprudence of the Court.

(2) *Second basis of claim: Article 29 of the Vienna Convention on Diplomatic Relations (inviolability of the person of diplomatic agents)*

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity.

685. As set forth in the *Counter-Memorial*, and affirmed by Uganda's Ambassador to the DRC, the FAC threatened, assaulted and robbed the Ambassador and another Ugandan diplomat at gunpoint on 11 August 1998. (UCM, para. 398 & Annexes 33, 89; UR Annex 87, para. 26.) And on 20 August 1998, the FAC also detained, assaulted and robbed a number of Ugandan diplomats upon their departure from Ndjili

International Airport. (UCM, para. 399 & Annex 23; UR Annex 87, para. 26.)

686. Rather than try to deny these facts outright (which she cannot), the DRC attempts to blunt their impact by arguing that Ugandan diplomats somehow left Kinshasa voluntarily and in orderly fashion.¹⁴⁰ (DRCR, paras. 6.93.) Yet, as set forth above, any such contention is nonsense. Uganda's diplomats (and other nationals) were in fact forced to flee the DRC following weeks of escalating attacks, not only on their persons, but on the Ugandan Embassy itself. If further confirmation of these facts were required, it appears in the form of the 1998 U.S. Department of State Human Rights Report on the DRC which states: "Military officers beat and injured Ugandan diplomats being evacuated from the country at Kinshasa's airport in August." (UR Annex 33, p. 6.)

687. To show the alleged orderliness of the Ugandans' departure, the DRC resorts to mischaracterising the summary report on the evacuation Uganda submitted with her *Counter-Memorial*. (DRCR, para. 6.93, citing UCM Annex 89.) The DRC cites portions of the evacuation report discussing the events of 28 August 1998. Yet, Uganda's principal complaint relates to actions that occurred much earlier on 20 August. As the report shows, what happened on 20 August was far less benign than the incident-free departure the DRC tries to depict to the Court. The report reads:

1. After eruption of the conflict in the Democratic Republic of Congo (DRC) on 2 August 1998 or there about, the Embassy of the Republic of Uganda in Kinshasa was affected in a number of ways:

¹⁴⁰ The DRC also argues that Uganda has failed to prove the nationality of the individuals beaten and humiliated by the FAC on 20 August 1998. (DRCR, paras. 6.72-6.73.) Yet, the fact that the evacuees were all Ugandan was acknowledged by the DRC herself when, on 19 August 1998, she gave written authorisation for the evacuation of the "32 *ressortissants Ougandais dont 4 diplomates*" individually identified on the authorisation (17 of whom were among those assaulted on 20 August). (UR Annex 28A.) ("32 Ugandan nationals including 4 diplomats")

(a) There were sporadic arrests and harassment of Ugandan nationals in the DRC, including Embassy staff. In fulfillment of its consular responsibilities, the Embassy was from time to time involved in ensuring the safety of the affected Ugandans. Sometimes the DRC authorities cooperated and sometimes they did not.

(b) A total of thirty two (32) Ugandan nationals sought protection and camped at the Official Residence and at the Chancery. This attracted further harassment of Embassy staff.

(c) On 11 August 1998 or there about, DRC soldiers stormed the Chancery by forcing their way through the main gate of the fence. They held the Ambassador and another diplomat on gun point, demanding for Rwandese nationals purported to have been kept at the Embassy. They left after they were allowed to loot some money. The Embassy protested to the authorities.

First Evacuation

2. Ms. Margaret Kedisi, Second Secretary, who had left Kinshasa for Kampala at the beginning of August 1998, was advised by the Ministry headquarters not to return to Kinshasa because of the prevailing circumstances. Similarly, all Ugandan nationals in the DRC were advised to evacuate the country.

Second Evacuation

3. *Seventeen out of the thirty two Ugandan nationals, who had sought protection at the Embassy, and the Administrative Attache of the Embassy (MS. Jane F. Onega*

Owachgui) were evacuated to Brazzaville by air through Ndjili Airport on 20 August 1998. UNHCR provided a helicopter. The evacuees were accompanied by the First Secretary (Mr. Henry Picho Okello), the Second Secretary (Mr. Richard K. Bamukuraki) and a Protocol Officer from the (DRC) Ministry of Foreign Affairs. The exercise was very difficult as stated below.

The evacuees were detained at the Airport (Ndjili) for more than three hours while being beaten, insulted and robbed of their valuables and liquid cash;

The Second Secretary and the Protocol Officer were also detained and suffered the same fate as the evacuees.

4. After that ill-treatment, the Embassy feared to release the other remaining group, which was still at the Embassy waiting for transport, until security would be guaranteed by the (DRC) authorities. The Embassy strongly protested to the (DRC) Ministry of Foreign Affairs and requested for more security to enable the next evacuation.

(UCM Annex 89; emphasis added.) Thus, rather than show that Uganda's evacuation was orderly and without incident, the summary report actually proves quite the opposite.

688. Furthermore, as the evacuation report states, and the DRC confirms, when Ambassador Batarangaya requested security to escort 17 Ugandan nationals from the Embassy to the airport on 20 August 1998, the DRC authorities sent only one civil servant -- a protocol officer from the Ministry of Foreign Affairs. (UCM Annex 89; DRCR, para. 6.81.) Predictably, this lone civilian protocol officer was powerless (and made no effort) to prevent the FAC's assault on and humiliation of seventeen Ugandan nationals trying desperately

to get out of a country whose government had publicly called Uganda an enemy State. (See DRCR, para. 6.83 (acknowledging early August 1998 hostility towards Ugandans).)

689. The evacuation report further reveals that after the 20 August 1998 debacle, Uganda's Ambassador to the DRC demanded a high-level meeting with the DRC authorities, and insisted on an explanation of the DRC Government's policy of ignoring his prior requests for security. Worried that the DRC officials would again renege on any promise to provide security during the next round of evacuations, the Ambassador invited other diplomats to the meeting. Among them were "the Dean of the Diplomatic Corps (Ambassador of Switzerland), the Dean of the African Diplomatic Corps (Ambassador of Togo), the UNDP Resident Representative, and the UNHCR Representative...." (UCM Annex 89; *see also* UR Annex 29.)

690. During that meeting, the Ugandan Ambassador agreed to evacuate the remaining Ugandan nationals who had sought refuge at the Embassy, but this time with the help of the other diplomats. In violation of international law, Congolese soldiers refused to allow the evacuees to take Embassy documents, briefcases, and personal items with them. (UR Annex 87, para. 9.)

691. Once again, the breaches of the Convention are forms of direct injury to Uganda and the local remedies rule does not apply.

(3) *Third basis of claim: Article 30 of the Vienna Convention on Diplomatic Relations (inviolability of the private residence of a diplomatic agent)*

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence, and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

692. As stated in the *Counter-Memorial*, and reiterated above, the inviolability of the Official Residence of the Ugandan Ambassador was repeatedly ignored by the FAC and other agents of the DRC Government. (UCM, paras. 400-01; *supra*, paras. 676-82.) Rather than repeat the bulk of those facts here, Uganda merely incorporates them by reference.

693. It does bear explicit mention, however, that the joint Ugandan-Congolese delegation that inspected the Chancery and Official Residence in September 2002 pursuant to the Luanda Agreement reported that the Official Residence was still occupied, and that all of its movable property was missing. (UR Annex 88, p. 3.)

694. These breaches of the Convention also constitute direct injury to Uganda and thus the local remedies rule does not apply.

(4) *Fourth basis of claim: Article 24 of the Vienna Convention on Diplomatic Relations (inviolability of archives and documents of the Mission)*

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

695. At the time Uganda's Ambassador and other Ugandan diplomats were forced to flee Kinshasa, they by necessity left behind almost all of the documents in their archives and working files. (UR Annex 87, para. 9.) Included among these were a number of top-security intelligence documents relating to covert contacts between the DRC Government and Congo-based anti-Uganda insurgent groups. (*Ibid.*, paras. 13-20.) Yet, when the joint delegation established pursuant to the September 2002 Luanda Agreement returned to the Chancery and Official Residence, they found both devoid of all "movable property belonging to the Uganda embassy or its former officials." (UR Annex 88, p. 3.) By the DRC's own admission, Uganda's archives and files, including her most sensitive intelligence files, had thus been stripped bare.

696. The breaches of the Convention constitute direct injury to Uganda and the local remedies rule is therefore inapplicable.

(5) *Fifth basis of claim: breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory.*

697. This basis of claim is additional to those based upon the Vienna Convention.

698. The authorities provide generally accepted formulations of the international minimum standard as, for example, in Oppenheim:

National and international standard of treatment: non-discrimination. It is a well-established principle that a state cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a state, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its own law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum international standard, and that a state which fails to measure up to that standard incurs international liability.'

(*Oppenheim's International Law*, 9th ed., Vol. I, Peace, 1992, p. 931, para. 409.)

699. A leading American source formulates the position as follows:

Customary International Law of Human Rights.

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

....

(d) torture or other cruel, inhuman, or degrading treatment or punishment,

(e) prolonged arbitrary detention...

(American Law Institute, *Restatement (3d) of the Foreign Relations Law of the United States*, 1987, Vol. 2, para. 702.)

700. In respect of the international minimum standard, Uganda holds the DRC responsible on the basis that the Government of the DRC violated her obligations under general international law in tolerating, encouraging and failing to prevent and punish the conduct described in the *Counter-Memorial* and elaborated above. (UCM, paras. 397-407 & Annexes 23, 33, 87, 89, 92; *supra*, paras. 685-90.)

701. In the *Reply*, the DRC asserts that the claims relating to the diplomatic protection of Ugandan nationals are inadmissible for the reason that local remedies have not been exhausted (DRCR, paras. 6.65–6.77.) This assertion is flawed on several grounds, and these grounds will now be presented (in no particular order).

702. In the first place the applicability of the local remedies rule is determined by the general character of the claim. As the Chamber of the Court observed in the *ELSI* case:

Moreover, when the Court was, in the *Interhandel* case, faced with a not dissimilar argument by Switzerland that in that case its “principal submission” was in respect of a “direct breach of international law” and therefore not subject to the local remedies rule, the Court, having analysed that “principal submission”, found that it was bound up with the diplomatic protection claim, and that the Applicant’s arguments “do not deprive the dispute...of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national...” (*Interhandel, Judgment, I.C.J. Reports 1959*, p. 28.) In the present case, likewise, the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett, said to have resulted from the actions of the Respondent. Accordingly, the Chamber rejects the argument that in the

present case there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part.

(I.C.J. Reports, 1989, p. 43, para. 52.)

703. In the circumstances of the present case, the breaches of the international minimum standard derive from the hostile activities of DRC security forces against the State of Uganda and against her embassy and the personnel of the mission as representatives of Uganda. The breaches of the Vienna Convention on Diplomatic Relations are manifestly the dominant feature. The individual victims were on the scene in their role as members of the Ugandan Mission, or as family members, or as staff, of the Mission.

704. In the *ELSI* case the Chamber of the Court ultimately applied the criterion of whether or not the State's claim was "distinct from, and independent of," that of its nationals. (*Ibid.*, pp. 42-43, para. 51.) The answer is in the affirmative in the present case. It is the hostile actions of the DRC toward the Ugandan Mission, and its forcible expulsion, which produced the violations which affected its nationals, and not the other way about.

705. In the second place, the local remedies rule is not applicable in any event because the principle is that the rule can only apply when effective remedies are available in the national system. As Professor Shaw states:

The term local remedies only applies to effective remedies.

(*International Law*, 4th ed., 1997, p. 567.)

706. And the same principle had been stated nearly forty years earlier by Sir Gerald Fitzmaurice in the *British Year Book of International Law*. (Vol. 37 (1961), pp. 59-64.) Fitzmaurice quotes the British Judge, Sir Hersch Lauterpacht, in his Separate Opinion in the *Norwegian Loans* case:

...the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act on it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.

(I.C.J. Reports, 1957, p. 39.)

707. Nevertheless, the DRC argues that Uganda's counterclaim is premature and should be rejected because the Ugandan nationals failed to exhaust local remedies prior to the presentation of Uganda's counter-claim to this Court. The DRC's argument would lead one to believe that the Congolese courts routinely dispense fair judgments and would give the Ugandan nationals a fair review of their claims:

Rien n'indique que chacune des personnes dont l'Ouganda entend assurer la protection ait engagé des poursuites devant les juridictions congolaises pour faire valoir ses droits. A fortiori, on ne peut évidemment estimer que les recours aient été épuisés au sein de l'ordre juridique congolais. Pourtant, des recours étaient, et sont toujours, disponibles en RDC. Le droit congolais permet en effet à toute personne de s'adresser aux cours et tribunaux pour formuler une réclamation à l'égard de quiconque lui aurait causé un dommage, pourvu qu'une faute puisse être établie dans le chef de celui qui aurait causé le dommage concerné. L'article 258 (Livre III) du code civil congolais reprend ainsi un principe classique de responsabilité pour faute, de la même manière que le font l'article 1382 des codes civils belge ou français, aux termes desquels "tout fait quelconque de l'homme,

qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.” Aucune exception relative à l'éventuelle qualité d'organe de l'Etat de l'auteur de la faute n'est mentionnée, ni n'est appliquée dans la jurisprudence des cours et tribunaux congolais. Il aurait donc été parfaitement loisible aux personnes qui se seraient estimées victimes de mauvais traitements de s'adresser aux juridictions compétentes, en demandant à n'importe quel cabinet d'avocat de Kinshasa de défendre leurs intérêts. Le procédé aurait permis de susciter une enquête sur ces événements et, le cas échéant, aux juridictions congolaises de condamner les éventuels fautifs. De tels recours n'ont, pour des raisons que la RDC ignore à ce jour, jamais été engagés.¹⁴¹

(DRCR, para. 6.75.)

708. The DRC's assertion that meaningful local remedies exist for Ugandan nationals is absurd. As the DRC is well aware, the Congolese judicial system has been in shambles for

¹⁴¹ “There is nothing to show that the persons for whom Uganda intended to ensure diplomatic protection instituted proceedings in the Congolese courts to claim for their rights. *A fortiori*, we do not think that they exhausted local remedies under the Congolese legal system. However, the said remedies are still available in the DRC. In fact, the Congolese law allows all persons to go to courts and tribunals to sue for whatever damage may have been caused to anybody, provided that the wrong can be established against the person who caused the damage in question. Section 258 (Vol. III) of the Congolese Civil Code contains the classic principle of responsibility for wrongs, similar to Section 1382 of the Belgian and French codes, which state that ‘any person who wrongs another is liable to make good for the wrong’. As regards this remedy it is immaterial that the person responsible for the wrong is an organ of the State. Therefore, the persons who thought that they had been subjected to inhumane treatment would have been perfectly at liberty to file legal action in any competent courts, by engaging any lawyer in Kinshasa to represent them. The proceedings would then lead to an investigation into these incidents and, if necessary, the Congolese courts would pass judgments against the persons responsible. This avenue was, for reasons not known to the DRC, not used by the aggrieved persons.”

decades. Plagued by corruption and a lack of funding, resources and personnel, the Congolese courts are not, and have never been, impartial dispensers of justice. In 1993, the United States Department of State wrote:

The [DRC's] critically under-funded judiciary system has nearly ground to a halt, hampering prosecutions. Furthermore, local human rights groups and others suspect that a degree of Government complicity in the January pillage has caused even more than the usual foot-dragging in prosecutions of soldiers involved in pillage-related abuses.

....

While the amended 1977 Constitution and the proposed new 1992 constitution provide for an independent judiciary, in practice the judiciary is not independent of the executive branch and has consistently been responsive to priorities and objectives set by the President and his Government.

(UR Annex 4, pp. 7, 13.)

709. The Congolese judiciary did not improve during the remainder of President Mobutu's government, or under the administration of President Laurent Kabila. In 1999, the U.S. Department of State described the Congolese judiciary as follows:

The judiciary continued to be subject to executive influence and corruption.

....

The Transnational Act of the Mobutu regime and Kabila's Decree Law No. 3 provide for the independence of the judiciary; however, in practice the judiciary was not independent of the executive branch, which could and did

manipulate it. The Kabila administration did not establish mechanisms to ensure the independence of the judiciary by year's end. A judicial reform decree, reportedly awaiting presidential approval since 1997, was not promulgated. The judiciary also is ineffective and suffers from corruption.

....

The system remains hobbled by major shortages of personnel, supplies, and infrastructure. The Kabila Government has acknowledged that the judiciary is dysfunctional....

(UR Annex 33, pp. 1, 11, 12.)¹⁴²

710. The Congolese judiciary continued to deteriorate in subsequent years. In March 2002, for example, the U.S. Department of State described the Congolese judiciary as follows:

Joseph Kabila ruled by decree, and the Government continued to operate without a constitution.... The judiciary continued to be subject to executive influence and corruption.

....

The judiciary remained subject to executive influence and continued to be underfunded, inefficient, and corrupt. It largely was ineffective as either a deterrent to human rights abuses or as a corrective force.

....

¹⁴² The basic flaws in the Congolese judicial system are reiterated in the U.S. Department of State's Human Rights Reports for the years 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2001.

Members of the security forces committed extra-judicial killings, and the Government misused the judicial system to try, sentence, and execute numerous persons without due process.

....

The law provides for an independent judiciary; however, in practice the judiciary was not independent of the executive branch, which manipulated it during the year. The Government failed to establish mechanisms to ensure the independence of the judiciary; a judicial reform decree, reportedly awaiting presidential approval since 1997, still had not been promulgated by year's end. The judiciary was ineffective and corrupt. The civil judiciary, including lower courts, appellate courts, the Supreme Court, and the Court of State Security, largely was dysfunctional.

(UR Annex 77, pp. 1-3, 11.)

711. The corrupt and dysfunctional nature of the Congolese judiciary, coupled with the virulently anti-Uganda atmosphere created by the DRC Government, made it both futile and unsafe for Ugandan nationals to file claims of abuse against the Congolese Government or its soldiers. Even if the Congolese judicial system were otherwise functional, history has shown that Congolese soldiers are rarely brought to justice for crimes against foreigners, and especially diplomats. (*See* UR Annex 33.)

712. In these circumstances, it is inconceivable that Ugandan nationals would have received a fair hearing in the Congolese courts. Indeed, it would have been a waste of time and resources -- and extremely dangerous -- for Ugandan nationals to have attempted to exhaust local remedies in the DRC.

713. In light of all this, Uganda agrees with the DRC -- but for very different reasons -- that:

*Aucune des personnes au bénéfice desquelles l'Ouganda souhaite exercer sa protection diplomatique ne semble avoir estimé utile de même entamer une quelconque procédure devant les juridictions de l'Etat où les faits incriminés étaient survenus.*¹⁴³

(DRCR, para. 6.77.)

(6) *Sixth basis of claim: the unlawful expropriation of the public property of Uganda by the DRC Government.*

714. As stated above, and as now admitted by the DRC herself, all of Uganda's property located in the Chancery and Official Residence is now missing. (*Supra*, para. 680; UR Annex 88, p. 3.) Accordingly, there can be no serious question as to the DRC's liability for the unlawful expropriation of Uganda's property as set forth in Annex 92 to Uganda's *Counter-Memorial*.

715. This basis of claim is additional to those based upon the Vienna Convention. It is essentially a further development of the fifth basis of claim. The expropriation of the property of a foreign State without lawful justification represents a specialised application of the international minimum standard. As the rule is stated in *Oppenheim's International Law*:

Protection afforded to the persons and property of aliens. The state in whose territory an alien resides must afford his person and property at least that level of protection which is sufficient to meet those minimum international standards prescribed

¹⁴³ "None of the persons for whom Uganda wishes to exercise its diplomatic protection seems to have thought it useful to file a case before the Courts of the DRC where the civil wrong was committed."

by international law, and must grant him at least equality before the law with its own nationals as far as safety of person and property is concerned. An alien must in particular not be wronged in person or property by the officials or courts of a state. Thus, the police must not arrest him without just cause, administrative officials must not treat him arbitrarily, and courts must treat him justly and in accordance with the law.

(*Oppenheim's International Law*, 9th ed., Vol. I, 1992, pp. 910-11, para. 405.)

716. There are good reasons for assuming that the minimum standard also applies to the public property of a foreign State. This position is supported by the following writers:

- (v) Foighel, *Nationalization*, Copenhagen, 1957, pp. 45-46;
- (i) White, *Nationalisation of Foreign Property*, London, 1961, pp. 151-53; and
- (ii) Brownlie, *Principles of Public International Law*, 5th ed., Oxford, 1998, p. 541.

717. The DRC has offered no legal justification for the seizures of Ugandan public property and no compensation has been either provided or offered. In any event, the non-payment of compensation in relation to the expropriation of foreign public property is not a condition of the illegality, but a further element of the illegality.

SUBMISSIONS

Reserving her right to supplement or amend her requests, the Republic of Uganda requests the Court:

(1) To adjudge and declare in accordance with international law --

(A) That the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the *Counter-Memorial*;

(B) That the requests of the Democratic Republic of the Congo that the Court adjudge that the Republic of Uganda is responsible for various breaches of international law, as alleged in the *Memorial* and/or the *Reply* of the Democratic Republic of the Congo, are rejected; and

(C) That the Counter-claims presented in Chapter XVIII of the *Counter-Memoerial* and reaffirmed in Chapter VI of the present *Rejoinder* be upheld.

(2) To reserve the issue of reparation in relation to the Counter-claims for a subsequent stage of the proceedings.

6 December 2002

Agent of the Republic of Uganda

Honourable Francis J. Ayume
Attorney General
Republic of Uganda
(signed)

PERSONALIA AND ABBREVIATIONS

AFDL	Alliance des Forces Démocratiques pour la Liberation du Congo-Zaire. Laurent Kabila's rebel organisation in the war against the government of President Mobutu Ssesse Seko, and his political organisation after he gained power in the DRC.
ADF	Allied Democratic Forces. Anti-Uganda insurgent group based in Congo, supported by the Government of the DRC and the Government of Sudan. One of the "armed groups" in Congo to be disarmed and demobilised under the terms of the Lusaka Agreement.
Amin, Idi	Former Ugandan dictator, linked to various anti-Uganda insurgent groups based in the DRC and Sudan. Currently lives in exile in Saudi Arabia.
Amin, Taban	Son of former Ugandan dictator Idi Amin. A Commander of the West Nile Bank Front (WNBF) anti-Uganda insurgent group.
ANC	Armée Nationale du Congo. The army of the DRC under President Laurent Kabila. Later renamed Forces Armées du Congo. (FAC).

Banyamulenge	Congolese Tutsis native to South Kivu Province.
Bashir, Omar	President of Sudan.
Bataringaya, Kamanda	Uganda's Ambassador to the DRC.
Bemba, Jean-Pierre	Leader of the Mouvement pour la Liberation du Congo (MLC), a Congolese rebel organisation originally based in Equateur Province. Rebelled against the government of President Laurent Kabila in September 1998.
Butime, Tom	Uganda Minister of Internal Affairs. Signed the April 1998 Protocol between the DRC and Uganda formalising the DRC Government's invitation to Uganda to station troops in eastern Congo to combat anti-Uganda insurgents.
"Byaruhanga, Salim"	A fictitious Ugandan prisoner of war that the DRC claims was captured at or near Kitona. In fact, no such person served in or is known to the Government of Uganda or its armed forces.
Chiluba, Frederick	President of Zambia, who played a key role in facilitating the Lusaka Agreement.
COMESA	Common Market for Eastern and Southern Africa.

DDRR	Disarmament, Demobilisation, Resettlement and Reintegration of “armed groups” in Congo, required by the terms of the Lusaka Ceasefire Agreement.
Ebamba, Mathias	Congolese army commander in charge of Congolese forces in eastern Congo under President Mobutu, and again under President Laurent Kabila. Supervised Congolese armed forces’ collaboration with the anti-Uganda insurgent groups in military actions against Uganda.
FAC	Forces Armées Congolaises. The army of the DRC under Presidents Laurent Kabila and Joseph Kabila.
FAR	Forces Armées de Rwanda. Rwandan armed forces under the government of President Juvenal Habyarimana, who carried out genocide against the Rwandan Tutsi population. Following their defeat by the Rwandan Patriotic Front (RPF) in 1994, ex-FAR members were organised in Congo to fight Congolese Tutsis and recapture the Government of Rwanda. In 1998, they were incorporated by President Laurent Kabila into the Forces Armées du Congo (FAC) to fight against Uganda and Rwanda.

FAZ	Forces Armées Zairoises. The army of the Government of Zaire under President Mobutu Ssesé Seko.
FUNA	Former Uganda National Army. Anti-Uganda insurgent group composed of former soldiers of dictator Idi Amin. Organised by the Government of Sudan in Congolese territory with the consent of the Congolese government. Later incorporated into the Forces Armées du Congo (FAC). One of the “armed groups” in Congo to be disarmed and demobilised pursuant to the terms of the Lusaka Agreement.
Habyarimana, Juvenal	President of Rwanda, and ally of President Mobutu Ssesé Seko of Zaire. Died in plane crash in April 1994.
Interahamwe	Rwandan Hutu militias that, together with the Forces Armées de Rwanda (FAR), carried out the genocide of Rwanda’s Tutsi population in 1994. Afterwards, they fled to Congo and reorganised to fight Congolese Tutsis and the new Government of Rwanda. In 1998, they were incorporated into the Forces Armées du Congo (FAC) by President Laurent Kabila to fight against Uganda and Rwanda.

JMC	Joint Military Commission. Created by the Lusaka Agreement to implement certain of its key provisions. Includes two officers from each of the States signatories of the Agreement.
Kabanda, Yusuf	Chief Director of the political wing of the Allied Democratic Forces (ADF), a principal anti-Uganda insurgent group.
Kabarebe, James	Rwandan army Brigadier, formerly Colonel, whom President Laurent Kabila appointed as his Army Chief of Staff in 1997, a position he held until July 1998. Previously served as leader of the Rwandan Patriotic Army (RPA) forces that helped defeat President Mobutu and install President Kabila in power.
Kabeba, Hajji	Anti-Uganda insurgent leader who coordinated military activities against Uganda with the Congolese government and with former members of the Forces Armées de Rwanda (ex-FAR) and Interahamwe.
Kabila, Joseph	President of the DRC since January 2001. Son of Laurent Kabila. Formerly Major General in the FAC.

Kabila, Laurent	President of the DRC from May 1997 until his assassination in January 2001. Political leader of the rebellion that overthrew the government of President Mobutu Ssesse Seko in May 1997.
Kagame, Paul	President of Rwanda. Formerly, Vice President, Minister of Defence and Major General of the Rwandan Patriotic Army (RPA).
Kakudji, Gaetan	Minister of the Interior of the DRC. Signed the April 1998 Protocol between DRC and Uganda formalising the DRC Government's invitation to Uganda to station troops in eastern Congo to combat anti-Uganda insurgents.
Karaha, Bizima	DRC Foreign Minister under President Laurent Kabila from May 1997 to August 1998.
Kategaya, Eriya	Former Minister of Foreign Affairs of Uganda.
Kavuma, Stephen	Uganda's former Minister of State for Defence.
Kazini, James	Former Commander of the Ugandan armed forces in eastern Congo.
Kiggundu, Mohamed	Chairman of the UNFM/A, an anti-Uganda insurgent group that allied with the Allied Democratic Forces (ADF) in 1998.

Kony, Joseph	Leader of the Lord's Resistance Army (LRA), an anti-Uganda insurgent group.
LRA	Lord's Resistance Army. Anti-Uganda insurgent group organised by Sudan and based in Sudan and Congo. Infamous for its practice of committing atrocities against Ugandan civilians. One of the "armed groups" in Congo to be disarmed and demobilised under the terms of the Lusaka Agreement.
Lakara, Nakabus	Acting Chief of Staff of the Uganda People's Defence Forces (UPDF).
Mai Mai	Traditional tribal militias in eastern Congo. Initially opposed to President Kabila, they were eventually brought into alliance with his forces fighting against Congolese Tutsis and Uganda.
Masire, Sir Ketumile	Former President of Botswana. Appointed Neutral Facilitator of the inter-Congolese dialogue pursuant to the terms of the Lusaka Agreement.
Mbabazi, Amama	Uganda's Minister of Defence, formerly Minister of State for Foreign Affairs.
Mbonye, Ben	Permanent Secretary in Uganda's Ministry of State for Defence.

MONUC	United Nations Observer Mission in the DRC. Created by the Security Council in August 1999 to help implement and monitor compliance with the Lusaka Agreement.
MLC	Mouvement pour la Liberation du Congo. Congolese rebel group originally based in Equateur Province, and headed by Jean-Pierre Bemba. Rebelled against the government of Laurent Kabila in September 1998. Party to a recent power-sharing agreement with the DRC Government in Kinshasa.
Mugabe, Robert	President of Zimbabwe.
Museveni, Yoweri	President of Uganda.
NALU	National Army for the Liberation of Uganda. Anti-Uganda insurgent group organised in Congolese territory with the consent of the Congolese Government and supported by the Government of Sudan. Most of its structure and membership were eventually incorporated into the Allied Democratic Forces (ADF), another anti-Uganda insurgent group. NALU and ADF are “armed groups” to be disarmed and demobilised pursuant to the terms of the Lusaka Ceasefire Agreement.

Namanga, Amos Ngongi	Special Representative of the United Nations Secretary-General to the DRC.
Ochan, Ralph	Permanent Secretary in Uganda's Ministry of Foreign Affairs.
Oris, Juma	A Commander of the West Nile Bank Front (WNBF) anti-Uganda insurgent group. Former Minister of Information in the government of Idi Amin.
Porter, David	Chairman of the "Porter Commission," an independent judicial panel established by the Government of Uganda to investigate allegations concerning the "exploitation" of the DRC's natural resources by Ugandan forces.
RCD	Rassemblement Congolais pour la Démocratie, a Congolese rebel organisation that took up arms against the government of Laurent Kabila in August 1998.
RPA	Rwandan Patriotic Army. The army of Rwanda since 1994.
RPF	Rwandan Patriotic Front. Rwandan rebel organisation that defeated the armed forces of the government of President Juvenal Habyarimana in 1994 and established a new government in Rwanda.

SADC	Southern African Development Community.
Sadat, Hajji	Director of Records of the Allied Democratic Forces (ADF), a principal anti-Uganda insurgent group.
Seko, Mobutu Ssesse	President of Zaire (now the DRC) from 1965-1997. Swept from power in the war led by Laurent Kabila.
Taha, Ali Othman	Vice President of Sudan.
UPDF	Uganda People's Defence Forces. The army of Uganda.
UNRF II	Uganda National Rescue Front II. Anti-Uganda insurgent group organised in Congo by the Government of Sudan with the consent of the Congolese government. One of the "armed groups" in Congo to be disarmed and demobilised pursuant to the terms of the Lusaka Ceasefire Agreement.
WNBF	West Nile Bank Front. Anti-Uganda insurgent group organised by the Government of Sudan. Initially, consisted of former members of armed forces of Idi Amin. Grew to 7,000 members. Transported by Sudan to Congo in 1998, where they were incorporated into the Forces Armées du Congo (FAC) and sent into battle against Ugandan government forces in eastern

Congo, and against Congolese rebel and Rwandan government armed forces in other parts of the DRC. One of the “armed groups” in Congo to be disarmed and demobilised pursuant to the terms of the Lusaka Agreement.

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