

CR 2005/16 (traduction)

CR 2005/16 (translation)

Vendredi 29 avril 2005 à 10 heures

Friday 29 April 2005 at 10 a.m.

8 Le PRESIDENT : Veuillez vous asseoir. La séance est ouverte. La Cour se réunit aujourd'hui pour permettre à la République démocratique du Congo de conclure le second tour de sa plaidoirie concernant les demandes reconventionnelles de l'Ouganda. Je donne donc la parole à M. Kalala.

Mr. KALALA:

The first Ugandan counter-claim, in so far as it relates to the period of Marshal Mobutu's presidency, is inadmissible and, in the alternative, totally without foundation

1. Mr. President, Members of the Court, I am taking the floor for the last time before this august Court to present the DRC's reply to Uganda's two counter-claims. In this connection, I should like at the outset to remind the opposing Party that its third counter-claim, concerning alleged violations of the Lusaka Agreement by the Congo, was dismissed by the Court in its Order of 29 November 2001, inasmuch as it was not directly connected with the instant case¹. Consequently, the DRC will not enter into the debate opened the day before yesterday by Mr. Reichler, who attempted to justify the fighting conducted on Congolese territory by the Ugandan army after the conclusion of the Lusaka Agreement of 10 July 1999 on the ground of alleged violations of that Agreement by the Congo².

2. Before beginning my examination of Uganda's two counter-claims, allow me first of all, Mr. President, to say a word about a more general question. In its most recent oral arguments, Uganda persisted in seeking to deny the Congo the right to present objections to the admissibility of the counter-claims at this stage³. The DRC had clearly indicated in its written observations on Uganda's counter-claims, in June 2001, that is to say *prior to* the Order made by the Court in November 2001, that it reserved the right to submit preliminary objections in its Reply⁴, which in fact is what it did. It is true that Uganda immediately attempted to deny it that right. But the Court settled that question in the clearest possible manner, by stating in its Order of 29 November 2001

¹*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Counter-Claim, Order of 29 November 2001, I.C.J. Reports 2001*, p. 680, paras. 42-43.

²CR 2005/14, p. 47, para. 34 (Mr. Reichler).

³CR 2005/15, p. 27, paras. 2-10 (Mr. Suy).

⁴Written Observations of the Democratic Republic of the Congo on the questions presented by way of counter-claims by the Republic of Uganda in its Counter-Memorial of 21 April 2001, pp. 67-68, paras. 74-76.

that the first and second counter-claims submitted by Uganda were admissible “as such”⁵, that is to say as counter-claims, while pointing out that “a decision given on the admissibility of a counter-claim *taking account of the requirements of Article 80 of the Rules of Court* in no way prejudices *any* question with which the Court would have to deal during the remainder of the proceedings”⁶.

3. The Court did not, therefore, prejudge the admissibility of the Ugandan claims from any standpoint other than that of their admissibility *as* counter-claims, within the meaning of Article 80 of the Rules of Court. For that reason, the Court is fully entitled today to rule on the preliminary objections raised by the Congo, in accordance with its case law in the *Oil Platforms* case, concerning which there is absolutely no reason to believe that it should be seen as an exception to an alleged comprehensive rule to the effect that such objections would be inadmissible at this stage.

4. Mr. President, Members of the Court, the rebuttal of the first Ugandan counter-claim will be presented in three stages: by myself, by Professor Corten, and finally by Professor Klein, in relation to three distinct periods: the period of Marshal Mobutu’s presidency, the period comprised between the accession to power of President Laurent-Désiré Kabila and the commencement of the conflict in the DRC on 2 August 1998, and finally the period subsequent to the outbreak of that conflict.

5. Professor Salmon will then briefly address the second Ugandan counter-claim concerning the Congo’s alleged responsibility for acts in relation to the Ugandan Embassy in Kinshasa and the treatment of certain Ugandan nationals. Lastly, Ambassador Masangu-a-Mwanza, in his capacity as Agent, will present the DRC’s final submissions.

10 The first Ugandan counter-claim concerning the period of Marshal Mobutu’s presidency must be rejected

6. That part of the first Ugandan counter-claim which relates to the period of Marshal Mobutu’s presidency must be rejected, primarily because Uganda must be held to have renounced its right to engage the responsibility of the DRC for incidents during that period and, in

⁵*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Counter-Claim, Order of 29 November 2001, I.C.J. Reports 2001, p. 681, para. 45.*

⁶*Ibid.*, p. 681 para. 46.

the alternative, because Uganda provides no evidence to justify the inference that Zaire violated its international legal obligations to Uganda.

I. Uganda renounced its right to engage the responsibility of the DRC for incidents that occurred during the period of Marshal Mobutu's presidency

7. Mr. President, Members of the Court, in his presentation last Wednesday, Professor Suy accused the DRC of “chopping up” the first counter-claim into “slices”, distinguishing between three periods, in order to “divert the Court’s attention from the period prior to May 1997⁷.”

8. One does not have to be a genius to understand the various reasons prompting Uganda to reject this version of the facts. First of all, Uganda does not wish to be reminded of the active part it played itself in “slicing up” the recent history of the Congo. I should explain at this point that every “slice” identified by the DRC was in fact separated from the preceding one by a Ugandan incursion into Congolese territory. There was first the political and military support given to the AFDL by Uganda, which resulted in the coming to power of Laurent-Désiré Kabila in 1997, in place of Marshal Mobutu — that was the cusp between the first and second periods; and secondly, the invasion of the Congo by Uganda in August 1998 — the cusp between the second and third periods. Next, the lumping together of the three periods in a “continuous wrongful act”, a sort of undifferentiated amalgam, is designed to spare Uganda the need to present convincing evidence concerning each of these periods, which would demonstrate that, from the standpoint of the significant players and the specific context, the Congolese authorities breached their international obligations to Uganda in respect of non-use of force. Lastly, the amalgamation of all the periods is designed to conceal the fact that, as regards acts committed in the first of them, the period of the Mobutu presidency, Uganda renounced its right to engage the international responsibility of the DRC, as I shall now explain.

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9. In his presentation on Wednesday 27 April, Professor Suy provided very little in the way of a response to the detailed arguments presented last week by my colleague Pierre Klein. Counsel for Uganda first stressed the principle of State continuity between Zaire and the Congo⁸, a principle which has never been questioned by the DRC. He then basically confined himself to retorting that

⁷CR 2005/15, p. 30, paras. 12-13 (Mr. Suy).

⁸*Ibid.*, p. 30, para. 14.

there had been a continuous reaction on the part of Uganda vis-à-vis Zaire, without however referring to a single specific act of protest. During the first round of pleadings, Professor Suy had, however, acknowledged that the filing of the Ugandan complaint had been motivated by the filing of the Congo's principal claim⁹. In other words, until recently the Ugandan authorities had never had, or expressed, any intention of presenting a claim in respect of events dating back to the Mobutu period. In the circumstances, there can be little doubt that there was a waiver within the meaning of Article 45 of the International Law Commission's draft Articles on State responsibility. This part of the Ugandan claim is, therefore, inadmissible. However, in the alternative, I shall address the substantive aspects of this first period in the second part of my presentation.

II. Uganda provides no evidence to justify the inference that, under the presidency of Marshal Mobutu, Zaire violated its international legal obligations to Uganda

10. Mr. President, Members of the Court, the respondent State accuses the DRC, first, of having breached its duty of vigilance under the reign of Marshal Mobutu by allowing Ugandan rebel movements to use its territory to launch attacks in Uganda, and, secondly, of having provided political and military support to those movements during the period concerned¹⁰.

12 11. Concerning the first accusation, Professor Suy stated in the course of his presentation on Wednesday 27 April that the Congo admitted having taken no steps to comply with its duty of vigilance and that its international responsibility is therefore automatically engaged¹¹. Mr. President, this assertion by Professor Eric Suy is wrong. The DRC wishes to reaffirm here what it has always said on this subject. It is clear that rebel movements, both Ugandan and Congolese, have for many years consistently taken refuge in Ruwenzori Mountains, which straddle the border between Uganda and the Congo. Since President Museveni came to power in January 1986, several armed groups have been formed in opposition to his régime and operate on the northern and western frontiers of Uganda. This situation barely changed, even when the Ugandan authorities invaded and then occupied the Congo for a period of nearly five years. It is thus not the Congo which created those movements.

⁹CR 2005/10, p. 26, para. 9 (Mr. Suy).

¹⁰CR 2005/15, pp. 32-35, paras. 18-27 (Mr. Suy).

¹¹*Ibid.*, p. 33, para. 23.

12. Mr. President, it may be helpful if I provide the Court with some information on the geographical and topographical configuration of the border area between the DRC and Uganda in the Ruwenzori area. First of all, one should not lose sight of the fact that the DRC is the only African country which borders on nine countries and has nearly 9,000 km of frontier. The Ugandan/Congolese border is over 1,000 km long. The Ruwenzori Mountains, a photograph of which can be seen by the Court on the screen behind me, are located in the southern section of the frontier between the Congo and Uganda. It is thus in this mountainous area, which is inhospitable and difficult of access, that Ugandan and Congolese rebel movements and miscellaneous bandits and robbers frequently hide out in order to pursue their activities and escape from the security forces of the two States.

13 Mr. President, Members of the Court, the impossibility of effectively policing such a frontier, especially in the Ruwenzori area, has been recognized by Uganda itself. In response to a United Nations criticism concerning violations of the embargo imposed by the Security Council on arms destined for the DRC, Uganda told the United Nations that there was a “lack of adequate capacity by the customs to monitor the 1,200 km border dominated by rough terrain and big lakes”¹². If, though, Mr. President, Members of the Court, Uganda admits to the United Nations that it cannot prevent illicit trafficking on a border nearly 1,200 km long, how can it accuse the DRC or Zaire of having breached its duty of vigilance on the same border? Mr. President, in the Congo, we are taught from a very young age that a snake is to be killed with the stick you have in your hand. The DRC can hardly be expected to position a military surveillance satellite or radar-fitted aircraft in the Ruwenzori in order to monitor the movements of armed groups, day and night, and thus prevent them from operating in Uganda or the Congo. A State exercises vigilance over its territory with the resources at its disposal, taking into account all the objective circumstances.

14. To return to the period 1994-1997, the Congolese Government introduced standard border surveillance measures, but it never received an explicit request from Uganda to take any particular measure against any particular rebel group. It is moreover impertinent, to say the least,

¹²Doc. S/2005/30, 25 January 2005, p. 30, para. 103.

on the part of the respondent State to accuse Zaire of a lack of vigilance, when it is Uganda itself which gave military support to Congolese rebel movements in that same area. Support which, as we know, lasted from November 1996 to May 1997, when the official Government of Zaire was overthrown by force. The Ugandan accusation concerning a lack of vigilance in the Ruwenzori Mountains for the period preceding the overthrow of Marshal Mobutu cannot therefore be reasonably upheld.

15. As regards the second charge¹³, Uganda accuses Zaire of having not only tolerated, but also supported the Ugandan rebels during the Mobutu era. By way of evidence, Professor Suy cited several annexes to the Ugandan Counter-Memorial¹⁴. In both its written and oral pleadings, the DRC has already made a detailed critical analysis of each of the Ugandan allegations and has shown that none of the annexes cited by the respondent State could be considered as legal proof¹⁵. Uganda has not answered these criticisms either in its written pleadings or during the oral phase. I shall not, therefore, go over them here in detail.

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16. Mr. President, as a measure of the lack of credibility of these documents, allow me to refer to Annex 6 to the Ugandan Counter-Memorial, as cited by Professor Suy. After accusing the Zairean authorities of supporting Ugandan rebels, a Ugandan intelligence report mentions that “the French and the Sudanese are also involved in assisting these rebel groups”¹⁶. Thus, Mr. President, here we have France, too, allegedly involved in the Sudanese/Congolese plot. Mr. President, Members of the Court, such assertions are so fanciful that they deserve no further comment.

17. Again, according to Annex 64 cited by Professor Suy, an annex entitled “ADF-Kabila Links — Revelations by Commander Junju Juma Former Commanding Officer ADF Presidential Protection Unit (code-named Mawingo) 17 May 2000”, we learn, under the heading “Logistics received by ADF from Kabila Government”, that the Kabila Government delivered arms in November 1996 and January 1997 to the Ugandan rebel movement ADF. However, Mr. President, it is common knowledge that, in November 1996 and in January 1997, Laurent-Désiré Kabila was

¹³CR 2005/25, pp. 34-35, para. 26 (Mr. Suy).

¹⁴*Ibid.*

¹⁵RDRC, pp. 359-362, paras. 6.26-6.33 and AWODRC, paras. 1.25-1.40.

¹⁶CMU, Ann. 6, p. 2, point 5.

president of neither Zaire nor the DRC. He assumed power only on 17 May 1997. And yet it is on the basis of such “revelations” that Uganda asks you today to find the Congo internationally responsible for acts dating back to that period.

18. Concerning the nine other annexes (1, 2, 3, 4, 5, 6, 7, 10 and 11) attached to the Ugandan Counter-Memorial, allegedly contemporaneous with the reign of Marshal Mobutu and covering the period 17 September 1990 to 15 October 1996, the DRC would point out to the Court that they are all internal documents of the Ugandan military intelligence services (Chieftaincy of Military Intelligence), and cannot constitute legal proof.

19. In the matter of evidence, Mr. President, the DRC takes issue not with the fact that Uganda produces documents prepared by its own services, but with the fact that it fails to provide additional evidence from neutral and credible sources to corroborate the reports of its own officials. It is incongruous, to say the least, that when the Congo produces military intelligence reports concerning the Kitona airborne operation, these are contemptuously dismissed by Uganda, with disparaging references to the Congolese intelligence services, even though the content of these documents is corroborated by various neutral and credible sources. Yet, the respondent State seeks

15 at the same time to engage the international responsibility of the DRC solely on the basis of documents drafted by its own military intelligence services.

20. In conclusion, Mr. President, Members of the Court, the DRC respectfully requests the Court to adjudge that Uganda has provided no reliable and credible evidence of, on the one hand, a breach by the DRC of its duty of vigilance and, on the other hand, its support for Ugandan rebel movements during the period 1994-1997. Mr. President, Members of the Court, I thank the Court for its kind attention and ask you to give the floor to Professor Olivier Corten, who will present the DRC’s response to the second part of Uganda’s first counter-claim. Thank you.

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

Mr. CORTEN: Thank you, Mr. President.

**THE DRC DID NOT VIOLATE ITS INTERNATIONAL LEGAL OBLIGATIONS TO UGANDA
BETWEEN MAY 1997 AND 2 AUGUST 1998**

1. Mr. President, Members of the Court, Uganda accuses the Congo of having attacked it in the weeks preceding 2 August 1998. This accusation is supposedly based on ties forged by the Congo with the Ugandan rebels and also with the Sudan. Yet Uganda has still not yet furnished any proof that such ties existed.

I. The persistent lack of proof of links between the DRC authorities and Ugandan rebel forces

2. Mr. President, in the second round of oral argument on the counter-claims, counsel for Uganda asserted that the DRC had violated international law “by allowing various rebel bands to use its territory to prepare and launch terrorist attacks and acts of subversion against Uganda, *or even supporting and aiding these rebels*”¹⁷.

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3. As the Court will have noted, the Ugandan claim would seem, at this final stage of the proceedings, to have curiously shrunk. Having first charged the DRC with directing and launching attacks against it¹⁸, then quite simply charged the Congo with providing general support to rebel groups¹⁹, the only charge Uganda now clearly maintains is that of mere toleration. The charge of support or aid has become just a hypothesis, which Uganda implicitly accepts it cannot prove by using the expression “or even”, which now precedes it. Duly noted. But what of the substance?

4. Counsel for Uganda asserts that rebel groups were “tranquilly”²⁰ launching attacks from the Congo. Mr. President, the same counsel for Uganda nevertheless referred, in the first round, to a “period of understanding between the two countries (from May 1997 to July 1998)”²¹. While another counsel for Uganda asserted, referring to the beginning of August 1998, that “until then President Kabila had been co-operating in that effort” to secure the border²². Another counsel

¹⁷CR 2005/15, pp. 26-27, para. 1 (Mr. Suy).

¹⁸CMU, paras. 5, 40 and 389.

¹⁹RU, p. 308, para. 666 and CR 2005/10 (Mr. Suy).

²⁰CR 2005/15, p. 30, para. 13 (Mr. Suy).

²¹CR 2005/10, p. 25, para. 6 (Mr. Suy).

²²CR 2005/6, p. 42, para. 67 (Mr. Reichler).

highlighted all the steps taken by President Kabila to facilitate the UPDF actions in the Congo, even claiming that consent had formally been given to the presence of these troops in Congolese territory²³. Nor is it disputed that the FAC themselves conducted a number of combat operations against the Ugandan rebels during this period²⁴.

5. Mr. President, pursuing rebels, authorizing a foreign army to conduct military operations against them on its own territory, concluding an agreement aimed at eradicating them, is this really “offering a safe refuge”²⁵ to these rebels or allowing them to act “undisturbed”? Uganda cannot, when pleading on the head of consent, dwell at such length on the active support given to its army by the Congolese authorities then, when pleading on the counter-claims, allege that these authorities were negligent, offering a “safe refuge” to the Ugandan rebels.

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6. The reply given to us is that President Kabila was playing a “double game”²⁶, that his conduct was “ambiguous”²⁷, that, even in this equatorial region, part of the “iceberg”²⁸ remained submerged.

7. But where is the evidence? Mr. President, for the first time the day before yesterday, a number of documents were cited by Uganda in its oral argument, to “prove” the active support of the Congolese Government to the Ugandan rebels during the critical period. What were they? Authentic documents, contemporaneous with the facts, not prepared for the present case, corroborated by other sources, comes the reply from our opponents²⁹.

8. In reality, these six documents, Annexes 12, 18, 20, 64, 71 and 76 to the Counter-Memorial, are not corroborated by *any* other source whatsoever. They are six texts produced by the Ugandan authorities themselves. Not all of them are precisely dated, but three were written during the year 2000 or in early 2001, i.e. at the same time as the Counter-Memorial³⁰.

²³CR 2005/8, pp. 10-12, paras. 12-19 (Mr. Brownlie).

²⁴RDRC, pp. 158-166, paras. 3.26-3.43 and CR 2005/3, p. 33, para. 12 (Mr. Corten).

²⁵CR 2005/15, p. 30, para. 13 (Mr. Suy).

²⁶CR 2005/14, p. 18, para. 31 (Mr. Reichler).

²⁷CR 2005/15, p. 30, para. 13 (Mr. Suy).

²⁸CR 2005/15, p. 34, para. 24 (Mr. Suy).

²⁹CR 2005/14, pp. 18-19, para. 33 (Mr. Reichler).

³⁰CMU, Anns. 64, 71 and 76.

Moreover, the DRC has already reviewed these documents in detail in its written pleadings³¹. So I shall only add a few comments here.

— First, the Court will note that two of these texts merely mention fears that a high-ranking Congolese officer may not prove effective enough in the fight against the Ugandan rebels, though no specific charge is levelled against him³².

— A third Annex quoted mentions contacts “in 1998”, then support in arms “later”, without providing any precise date for this support³³; so it can certainly not be used to prove Congolese aid to the Ugandan rebels during the critical period, prior to 2 August 1998.

18 — Two other texts, it is true, contain “revelations” by ADF prisoners, according to which links had allegedly been established with the Congolese authorities before this date. Links, but nothing more, because just when these links were about to result in material support, war broke out in the Congo, the UPDF invading the eastern part of its territory. “We didn’t get those weapons”, one of them tells us³⁴. “UPDF captured Kisangani before ADF could pick [up] the arms”³⁵, says another. So, even on the basis of these documents, no material support.

— As to the sixth document, it is supposedly based on the testimony of an individual having taken part in the attack on Kichwamba, who in this connection does not mention any aid, or support, or tolerance by the Congolese authorities, but refers to a plan — yes, a plan, with nothing to suggest it was implemented — to contact a Congolese soldier for the purpose of obtaining support³⁶.

9. Lastly, two days ago, Uganda produced a document “proving” that Taban Amin was appointed general of the FAC, on a date which remains unspecified. Uganda produced a curiously truncated version of this document, but the Congo has managed to obtain the full text. The Court will no doubt, in its own time, read the press article concerned, which is tab 45 in the judges’

³¹See in particular RDRC, pp. 189-191, paras. 3.89-3.93, AWODRC, p. 22, para. 1.32.

³²CMU, Anns. 12 and 18, and the quotations taken from the oral argument of Mr. Reichler on 27 April 2005, CR 2005/14, paras. 34 and 35.

³³CMU, Ann. 64, p. 1, the quotations being taken from the oral argument of Mr. Reichler, 27 April 2005, CR 2005/14, p. 19, para. 37.

³⁴CMU, Ann. 71.

³⁵CMU, Ann. 76.

³⁶CMU, Ann. 20.

folders. It will gain a — to say the least — picturesque impression of an individual who, although the son of Idi Amin Dada, now states he is the “son of Museveni”, at the same time asserting that he has become a UPDF general. An appointment as fanciful as his alleged one in the Congolese army, if one is to believe the denials of the UPDF spokesman himself.

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10. Mr. President, Members of the Court, are these really “proofs” on which the Court should rely in order to establish a wrongful act attributable to the Congo — an act, moreover, as serious as an actual armed attack?

11. Last Wednesday, one of Uganda’s counsel took umbrage at remarks by the Congo to the effect that documents had been fabricated by Uganda for the purposes of the case³⁷. “Fabricated”, which in French means simply “put together”. Nothing more, but also nothing less. And it is an objective fact that most of the documents appended to the Uganda written pleadings were put together by the Ugandan authorities themselves. Moreover, there are strong indications to suggest that some of these “witness statements” taken from prisoners or informers in unknown circumstances, totally lack credibility, regardless of the period concerned.

— Need one recall the case of the prisoner who “testifies” to events which took place in the Congo when, at the time of the events, he was in a Ugandan prison?³⁸

— Need one recall, as Maître Kalala has already reminded you, the fanciful charges that France itself assisted the Ugandan rebels?³⁹

— Is there any need to revisit the incredible episode of the Ugandan Ambassador posted to Kinshasa who, at the stage of the Rejoinder, for the first time “remembered” irrefutable evidence which he had left behind in his Embassy in 1998, yet never transmitted to his authorities?⁴⁰

12. Mr. President, Members of the Court, obviously it was not experienced counsel such as our learned opponents who crafted documents such as these. It was clearly other parties in Uganda, whose motives it is not for us to try and fathom. What, on the other hand, is certain, is that it is no

³⁷CR 2005/14, pp. 31-32 (Mr. Brownlie).

³⁸CMU, Ann. 63; see RDRC, pp. 373-374, paras. 6.60-6.61.

³⁹CMU, Ann. 6, para. 5.

⁴⁰RU, p. 322, para. 695 and Ann. 87, paras. 9 and 14; reviewed in AWODRC, pp. 23-25, paras. 1.34 -1.36.

20 exaggeration to speak, as the Congo has done — to use the language of counsel — of certain “fabricated or ludicrous evidence”⁴¹.

13. In light of all these elements, it is clear that Uganda has not proved that there was any aid or support whatever to Ugandan rebels by the Congolese authorities. And the same conclusion may be drawn as regards the mysterious links supposedly established with the Sudan as early as 2 August 1998. This brings me to the second part of my argument.

II. The persistent lack of evidence of links between the DRC authorities and the Sudanese armed forces

14. Mr. President, during the first round counsel for Uganda asserted that the “diabolical” tripartite alliance between the Congo, Ugandan rebels and the Sudan had been established “*after . . . the period . . . from May 1997 to July 1998*”⁴². The Congo pointed out that this assertion presupposed that no such alliance had been concluded *during* this period⁴³. Uganda’s only reaction was to contend last Wednesday that, *after* the invasion of the Congo, “to save itself, one of the foreign Powers to which the DRC turned for military support in its hour of need was the Sudan”⁴⁴. The “specific facts” subsequently referred to as “detailed elements of Uganda’s case”, date, at their earliest, from 14 August 1998⁴⁵. In light of these statements, Uganda would seem very clearly to have renounced its claim that the “diabolical alliance” was concluded before the outbreak of war.

15. It is true that last Wednesday one of Uganda’s counsel expended a great deal of time and energy in seeking to give some form of general credence to the conspiracy scenario, without our even knowing what the exact period was that it might cover — even stooping to claiming that it was “obvious” that the Congo’s counsel “have not read their own pleadings”⁴⁶. What could lie
21 behind so sweeping a claim by someone usually so moderate and courteous in tone?

16. Mr. President, Members of the Court, after the Congo had emphasized that the other Party had adduced no evidence whatever, Uganda was faced with a real dilemma: to abandon its

⁴¹CR 2005/12, para. 20 (Mr. Salmon).

⁴²CR 2005/10, p. 25, para. 6 (Mr. Suy); emphasis added.

⁴³CR 2005/11, p. 27, para. 25 (Mr. Corten).

⁴⁴CR 2005/14, p. 29, para. 57 (Mr. Reichler).

⁴⁵Mr. Reichler, *ibid.*, pp. 12-13, para. 18.

⁴⁶CR 2005/14, p. 8, para. 3 (Mr. Reichler).

claim — which it seems to have done, at least in respect of the critical period, as we have just seen — or to adduce fresh evidence — which it could not do. It is doubtless in order to try to escape from this dilemma that it has been driven to the last resort: sensational revelation. To repeat the words of my learned opponent about the plot with the Sudan, “these facts are fully proven by the DRC’s own written pleadings and the documentary evidence attached thereto”⁴⁷. But where is the evidence in question?

17. In the Congo’s written pleadings? The only passage referred to is paragraph 3.24 of the Reply, “quoting a document with approval”, according to Uganda⁴⁸. In fact the Reply does no more than cite a report alleging that, after the start of the conflict, Kabila was “looking for new alliances”⁴⁹, the Sudan, among others, being then cited in this regard. The origins of this rumour, which refers only to *looking for* an alliance at this stage, are not specified. Far from approving it, as Uganda claims, the Congo expressly states in its Reply that this is no more than a “hypothesis”, and one that does not cover the critical period prior to 2 August 1998⁵⁰.

18. So there is nothing in the Congolese written pleadings. But what of the annexes to these pleadings? Mr. President, Members of the Court, here is the “extensive and impressive proof”⁵¹ that Uganda has just discovered and finally reveals to us, in its very last round of pleadings. This volume annexed to the Congo Reply includes exactly 145 documents, all of them communiqués from IRIN, Integrated Regional Information Networks attached to the United Nations. Uganda has carefully selected three of these 145 documents, because most of the others contradict its own version of the facts.

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19. The first, dated 9 September 1998, states that there were reports of the Sudan flying military supplies to DRC forces⁵². However, it immediately adds, and this passage, oddly enough, was not cited by Uganda’s counsel, that the reports could not be confirmed⁵³. A press report, citing

⁴⁷*Ibid.*, p. 11, para. 15.

⁴⁸*Ibid.*, pp. 16-17, para. 28.

⁴⁹RDRC, p. 156.

⁵⁰*Idem.*

⁵¹CR 2005/14, p. 16, para. 27 (Mr. Reichler).

⁵²“Diplomatic and military sources told IRIN today (Wednesday) they had received reports the Sudan had been flying military supplies . . . to the forces of DRC”.

⁵³“It was not possible to confirm these reports.”

unspecified “diplomatic and military sources”, sources based on “reports” by unidentified authors and which could not be confirmed. So much for the first “proof” relied on by Uganda.

20. Let us now turn to the second. One of Uganda’s counsel has cited an IRIN communiqué dated 14 September 1998 which, he asserts, contains the following statement: “Last week, 2,000 Sudanese soldiers were sent to the DRC to support [President] Kabila’s army”⁵⁴. But what exactly does this document actually say? It begins by referring to claims by a senior Ugandan official, immediately refuted by a representative of the Sudan⁵⁵. Then it continues: “Last week, *the Brussels-based Le Soir reported that 2,000 Sudanese soldiers were sent in DRC to support Kabila’s army.*”⁵⁶

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21. Doubtless because it slipped his mind, our learned opponent failed to cite the phrase that I have just emphasized. IRIN does *not* claim that 2,000 Sudanese soldiers had been sent to the Congo. The Belgian newspaper *Le Soir*, to which this communiqué refers, states in its issue dated 7 September 1998 that “*according to a Kinshasa newspaper, two Sudanese battalions are said to be in the north of the country, near Bunia, to help in the capture of Kisangani and to drive out the Ugandans who were there*”⁵⁷. In short, IRIN prudently refers to a newspaper which itself refers to another newspaper, we do not know which, that itself mentions a hypothesis (“are said to be”). This is clearly fanciful; no Sudanese soldier ever threatened the UPDF when it arrived and subsequently occupied Kisangani, as from 1 September 1998.

22. Our opponent then cites another IRIN communiqué, dated 16 September 1998, which allegedly establishes, to use his own words, that “the Sudan had sent 2,000 of its soldiers to Kindu . . . to help DRC President Kabila and his allies”⁵⁸. Mr. President, obviously I must have failed to read the Congo’s written pleadings properly, because when I consult the document in question once again I fail to find the same thing that my learned opponent has found. In fact the

⁵⁴Oral argument by Mr. Reichler, 27 April 2005, CR 2005/14, p. 9, para. 6.

⁵⁵ “The ‘East African’ weekly newspaper reported today on claims that some 2,800 Rwandan and Ugandan Hutu rebels were being trained at three camps in southern Sudan as part of the government of the Sudan’s support to Kabila. The newspaper quoted the director of Uganda’s External Security Organization as saying that the training of the Hutu youth was part of a ‘Sudan-Congo conspiracy’ . . . The East African reported an official of the Sudanese Embassy in Nairobi as denying the allegations.”

⁵⁶Emphasis added.

⁵⁷Colette Braeckman, “*La haine ethnique secoue le Rwanda et divise le Congo*”, *Le Soir*, 7 September 1998; emphasis added.

⁵⁸CR 2005/14, p. 9, para. 7 (Reichler).

IRIN report states that *rebels claimed yesterday* that the Sudan had sent troops to Kindu⁵⁹. The words “rebels claimed yesterday” were not quoted by Uganda’s counsel; similarly, doubtless by chance, he did not think it worthwhile mentioning that the FAC Chief of Staff categorically denied the allegation, as did the Sudanese Foreign Minister⁶⁰.

24 23. We now come to the book by the leader of the MLC, which both Professor Salmon and I “obviously have not read”⁶¹, to adopt the obviously irritable tone of our eminent opponent. Mr. President, Members of the Court, I have read this book with great interest, not to find out what the author’s personal assessment of events was — which was cited the day before yesterday and which proves absolutely nothing⁶² — but in order to read his direct testimony on certain facts connected with the present case. Here are my conclusions about the battle for Gbadolite in July 1999. I quote my pleadings of 22 April last: “the leader of the MLC, which fought side by side with the UPDF, describes the principal stages in the battle *without ever mentioning a single clash with Sudanese forces*”⁶³. Professor Salmon made a similar assertion⁶⁴, which is not contradicted at all, either by the passages cited last Wednesday or by any other passage in this book, which never mentions a clash with Sudanese soldiers. Despite their best efforts, there is one fact that Uganda’s counsel have clearly been unable to obscure: although the fighting between the Sudanese army and the UPDF in Congolese territory purportedly lasted several weeks, not a single shred of evidence has been produced to substantiate this scenario.

24. But now Uganda plays its very last card, an admission by the Congo. We are suddenly told that there has been a “failure by the DRC to deny evidence”⁶⁵ of the Sudan’s involvement in the war against Uganda, and even that the DRC does not deny the existence of an alliance with the Sudan⁶⁶. They even beg us not to go back *in extremis* on that admission, appealing to our sense of

⁵⁹“*Rebel claimed yesterday (Tuesday) that the Sudan had sent 2,000 of its soldiers to Kindu . . .*” (RDRC, Ann. 108.)

⁶⁰“The chief of staff of the Forces armées congolaises (FAC) has ‘categorically denied’ the allegation”. (*Ibid.*)

⁶¹CR 2005/14, p. 10, para. 12 (Mr. Reichler).

⁶²See the excerpts cited in oral argument by Mr. Reichler, 27 April 2005, CR 2005/14, p. 17, paras. 29-30.

⁶³CR 2005/11, p. 32, para. 38 (Mr. Corten); emphasis added.

⁶⁴CR 2005/12, para. 7 (Mr. Salmon).

⁶⁵“DRC’s failure to deny . . . evidence”, CR 2005/14, p. 11 (Mr. Reichler), sub-heading in bold type.

⁶⁶“The DRC does not deny that it made a military alliance with the Sudan”, *ibid.*, p. 12, para. 17.

25 honour⁶⁷. Mr. President, the Congo has spent years contesting the “evidence” adduced by Uganda of a plot linking the DRC, the Sudan and Ugandan rebels. In its most recent written pleadings the DRC has expressly stated that it has “always denied, and continues to deny, approving any support whatever for subversive activities against the Ugandan authorities”⁶⁸. In the first round of oral argument the Congo stated that, even though it would have had a perfect right to do so, it “did not call on the Sudan to support or defend it”⁶⁹. The truth is that the Congo has never expressed an opinion as to which country, the Sudan or Uganda, had attacked the other first⁷⁰. To deduce from this any kind of admission in the context of the present case is so absurd that it calls for no further comment.

25. Mr. President, Members of the Court, there is no evidence, no evidence whatever, of a plot involving the DRC, Ugandan rebels and the Sudan, either in Uganda’s or the Congo’s written pleadings or elsewhere. The only documents relied upon by Uganda contain accusations, claims and rumours, but also denials and doubts. They do not establish a single fact. Even assuming that this hearsay evidence were accepted, the Court will note that it *never* deals with the period prior to 2 August 1998, but always refers to the period following that date. No evidence, however flimsy, gives credence to the argument of double-dealing by President Kabila, who, while co-operating with Uganda, purportedly hatched a plot in secret with the Sudan before the war started. And it should be stressed that, from that date, the DRC was in a situation of self defence. Mr. President, I now ask you to call Professor Klein to the Bar of the Court; he will deal with the third period to which Uganda’s counter-claims relate, the period during which the Congo was in a position of self-defence.

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

⁶⁷*Ibid.*, p. 14, para. 21.

⁶⁸AWODRC, p. 37, para. 1.51; see also para. 1.52 and p. 35, para. 1.48.

⁶⁹CR 2005/3, p. 40, para. 29 (Mr. Corten).

⁷⁰CR 2005/12, para. 4 (Mr. Tshibangu Kalala).

Mr. KLEIN:

THE DEMOCRATIC REPUBLIC OF THE CONGO IS NO MORE RESPONSIBLE FOR ANY VIOLATION OF ITS INTERNATIONAL LEGAL OBLIGATIONS TO UGANDA AFTER 2 AUGUST 1998 THAN IN EARLIER PERIODS

26

1. Mr. President, Members of the Court, it is now my task to deal with the last period at issue in Uganda's first counter-claim and to show that the Democratic Republic of the Congo was not responsible for the use of force against Uganda in violation of international law after 2 August 1998. I hope that the fact that I am about to address an issue previously treated by my colleague and friend Olivier Corten will not upset Mr. Reichler and lead him to exaggerated conclusions about the discomfort experienced by the Congo in dealing with that time period. If Uganda is unable to establish the responsibility of the Democratic Republic of the Congo in respect of that period, it is above all because the Congo cannot be accused of any offensive action, any attack, against Uganda. It should be recalled in this respect that the other Party has been unable to produce probative evidence confirming the Congo's involvement in a single hostile action directed at its forces, or its territory, after the beginning of August 1998⁷¹. In any event, from the legal perspective, the Congo, as it has already shown a number of times — and as my colleague Olivier Corten has just reminded us — was in a position of self-defence from that date onwards, and this undeniably entitled it to use force to repel the aggression against it, as well as to seek support from other States⁷². According to Mr. Reichler, this is a newly adopted position, taken by the Congo for the first time during this oral phase of the proceedings⁷³. This is obviously untrue, and I shall take the liberty of respectfully referring my esteemed opponent to the Congo's written pleadings, more specifically to paragraphs 6.49 and 6.50 of the Reply, so that he can himself ascertain that the Congo has been making this self-defence argument for nearly three years now⁷⁴. As I shall show later in this statement, much evidence confirms that the Congo was in a position of self-defence from 2 August 1998 onwards. In this connection I shall review the events occurring

⁷¹See the statement by Mr. Corten, 22 April 2005, CR 2005/11, pp. 28-32, paras. 28-39.

⁷²*Ibid.*, pp. 32 *et seq.*, paras. 40 *et seq.*

⁷³CR 2005/14, p. 15, para. 25.

⁷⁴RDRC, pp. 369-370.

between early August and mid-September 1998, in respect of which the Parties remain deeply divided.

27

I. The armed attack by Uganda did indeed begin on 2 August 1998

2. In respect of the starting point for this analysis, Mr. Reichler implied in his statement on Wednesday that the Democratic Republic of the Congo was no longer claiming that 2 August marked the commencement of Uganda's invasion of the Congo⁷⁵. Here again, the analysis is wrong. I shall simply recall the clarification of this point made by Maître Kalala as Co-Agent of the Democratic Republic of the Congo in his first statement last Monday: "The Congo's claim covers a period commencing at the start of Uganda's aggression on 2 August 1998 and terminating with the present proceedings."⁷⁶ The Congo's adoption of this date is neither arbitrary nor the result of confusion as between the respective actions of Uganda and Rwanda. Rather, quite simply, it is because that is the date when the rebellion against President Kabila's Government commenced and because Uganda's participation in the Kitona airlift, from 4 August onwards, and the launching of military hostilities by the Ugandan army in the eastern Congo over the following days clearly show that Uganda was, *from the beginning*, a participant in this massive military operation aimed at overthrowing the Congolese Government. Thus, there has been no change in the Democratic Republic of the Congo's position on this point.

II. Uganda did indeed participate in the Kitona airborne operation from 4 August 1998 onwards

3. Uganda — and the Court heard this just two days ago — continues however to deny its involvement in the Kitona operation. According to its counsel, the evidence adduced by the Congo to prove that involvement is insufficient, essentially because it allegedly consists of conflicting press reports, witness statements prepared for the purpose and, moreover, taken by the Congolese intelligence services, allegedly guilty of serious human rights violations in the past⁷⁷. Finally, the purported "*coup de grâce*", Uganda's participation in the Kitona operation is not confirmed by

⁷⁵CR 2005/14, p. 21, para. 43.

⁷⁶CR 2005/12, p. 12, para. 11.

⁷⁷CR 2005/14, pp. 24-25, paras. 50-51 (Mr. Reichler).

28 documents which were contemporary with it, in particular by complaints lodged at the time by the Congo's representatives⁷⁸. I shall confine myself to four remarks in this regard.

4. First, the press reports are merely one of the elements on which the Congo relies, part of a body of evidence of different kinds. What is more, the sources on which these reports are based are varied, and the accounts thus do not all originate from a single source. Second, while some witness statements adduced by the Congo were in effect taken after this case was initiated, that is not true of all of them. At least two of them were obviously gathered *in tempore non suspecto*, during the latter half of 1998⁷⁹. As for the allegations of maltreatment, it is, to tell the truth, difficult to find anything which would entitle Uganda to claim that duress of any kind was applied in the present case, especially since there is absolutely nothing indicating that the affidavits given in 1998 were taken by the intelligence services incriminated by Uganda. In any event, the statements given at the time of the facts and the contemporary press reports corroborate each other. Third, Uganda's contention that the Congolese authorities failed at the time to mention participation by Ugandan troops in this operation is wrong. In the letter he sent on 19 August 1998 to the President of the Security Council, the Congo's Permanent Representative to the United Nations complained of the consequences of the "interruption by the Rwandan-Ugandan military coalition of the supply of water and electricity to the city of Kinshasa"⁸⁰. I would remind you that the Congolese capital receives its water and electricity from the Inga Dam, which Rwandan and Ugandan troops seized during their march on Kinshasa from Kitona. To dispel all doubt on this subject, I shall refer again to the statement by the same Permanent Representative of the Congo, on 10 September 1998, clearly accusing "Ugandan troops [of having] laid mines around the Inga Dam"⁸¹. Here then are clearly two Congolese statements, contemporary with the facts, which, without the slightest ambiguity, implicate Uganda in regard to its participation in this operation. Exit the "*coup de grâce*".

29

⁷⁸*Ibid.*, pp. 25-26, para. 52.

⁷⁹The affidavit of one of the pilots who said that he flew Ugandan soldiers to Kitona is dated 15 October 1998 (RDRC, Ann. 62); as for the affidavit of the commander of the Kitona base, who confirms the presence of Ugandan soldiers, it is manifestly contemporaneous with the facts, as shown by the specific list of planes landing at Kitona in this operation, with the indication of the registration information for the aircraft in question (RDRC, Ann. 61).

⁸⁰Doc. S/1998/778, RDRC, Ann. 40.

⁸¹*Ibid.*, Ann. 42.

5. Finally, how could I conclude this brief discussion of the issue of evidence without recalling the utter silence very carefully maintained by Mr. Reichler on Wednesday on the *Ugandan* sources previously cited by the Congo, which also confirm Uganda's involvement in the Kitona operation. In the face of this accumulation of varied evidence, some of which is based on Ugandan sources which the other Party was not in a position to impugn, Uganda's denials on this point obviously grow less and less credible. The same problem arises, moreover, in respect of the scenario spun by Uganda in respect of the modes of its intervention in the eastern Congo — a scenario which Uganda's counsel never stop rewriting, in an attempt to adapt it to each advance made by the Democratic Republic of the Congo in proving these facts.

III. Operation "Safe Haven" did indeed begin on 7 August 1998 and aimed at supporting the Congolese rebels

6. Thus, in respect of the start of Uganda's armed actions in Congolese territory, it is at the very least intriguing to hear Uganda's counsel repeatedly affirm, hand on heart, that Uganda has never altered its version of the facts⁸². Is it necessary to recall, once again, in this respect that Uganda was still insisting even in its Rejoinder that the Congo had been "unable to show that Uganda intervened militarily in the DRC before mid-September 1998"⁸³ and that "Uganda initiated no military action for more than six weeks — until the middle of September"⁸⁴ and that on 13 August "there was no border crossing by Ugandan troops at Aru or any other location" and that "there is no evidence whatsoever that Ugandan forces entered the DRC in August 1998"⁸⁵.

30

7. Confronted with the testimony given by Ugandan soldiers before the Porter Commission, counsel for Uganda were forced to elaborate the thesis of a "modest reinforcement" of UPDF troops in the Democratic Republic of the Congo allegedly occurring on 13 August 1998. But does such a reinforcement not require that the border be crossed, and thereby call into question the assertions, as categorical as they are, in Uganda's written pleadings that "there is no evidence whatsoever that Ugandan forces entered the DRC in August 1998"? And the doubt raised by this

⁸²See, *inter alia*, CR 2005/14, p. 22, para. 44 (Mr. Reichler).

⁸³RU, p. 7, para. 22.

⁸⁴*Ibid.*, p. 26, para. 63.

⁸⁵*Ibid.*, p. 67, paras. 154-155.

does not relate solely to the date of 13 August. It applies equally to the date of 7 August. To refresh the memory, 6 or 7 August is, according to the other Party, the date on which a Ugandan contingent, peacefully in place in Beni, with the consent of the Congolese authorities, was subjected to a totally unexpected attack on the part of the *Forces armées congolaises*, allegedly joined by ADF rebels⁸⁶. As the Congo has already pointed out a number of times, the problem is that this alleged attack is not confirmed by anyone at all⁸⁷. Thus, it would be fruitless to look for any reference in the testimony of the Ugandan military leaders before the Porter Commission, for example. Quite to the contrary, this version of the facts is contradicted both by the Congolese soldiers then present on the ground and by General Kazini himself. Thus, Major Mwimba, of the *Forces armées congolaises*, explains in his statement about these events that a Ugandan column of tanks set out from the Congolese locality of Lume, near the Ugandan border, on 5 August 1998 and seized Beni shortly afterwards⁸⁸. Thus, nothing whatsoever to do with a Ugandan contingent already peacefully stationed in Beni at that date. As for General Kazini, his testimony before the Porter Commission is crystal clear. Mr. Reichler endeavoured to question its significance, trying once again to give it a meaning in complete contradiction with its very terms, clear as they are. The most striking passage in that testimony should be recalled: “‘Safe Haven’ started after the capture of Beni, that was 7 August 98.”⁸⁹ The capture of Beni, Mr. President, Members of the Court. Once again, this is not at all a question of some defensive action by the Ugandan forces, but rather a genuine offensive.

8. Mr. Reichler also offered a very peculiar reading of General Kazini’s testimony as to the general strategy in the context of which Uganda’s armed action must be viewed. I shall briefly recall the words of the testimony on this point: “there was a mutiny, the [Congolese] rebels were taking control of those areas. So we decided to launch an offensive together with the rebels, a special operation we code-named Safe Haven.”⁹⁰ According to Mr. Reichler, the reference by General Kazini to the support given by the Ugandan army to Congolese rebels in the “Safe Haven”

⁸⁶CR 2005/6, p. 35, para. 53; CR 2005/14, pp. 21-22, para. 44 (Mr. Reichler).

⁸⁷See, *inter alia*, CR 2005/11, p. 29, para. 32 (Mr. Corten).

⁸⁸RDRC, Ann. 53, pp. 3 and 4.

⁸⁹CW/01/03 24/7/01, p. 128; DRC’s judges’ folder, tab 11; CR 2005/2, p. 30, para. 40 (Mr. Kalala).

⁹⁰CW/01/03 24/7/01, p. 129; DRC’s judges’ folder, tab 17; see CR 2005/2, p. 39, para. 68 (Mr. Kalala).

32 operation relates only to a later time, corresponding to the creation of the armed branch of the MLC — the *Mouvement de Libération du Congo* — and in no way applies to the start of the operation, in early August 1998. That explanation lacks credibility and is contradicted by the words themselves of the testimony, which unequivocally link the start of Uganda’s military intervention in the Congo with the beginning of the mutiny and the appearance of the Congolese rebel movements. In confining himself to referring to the later creation of the MLC, in September 1998 — so that the operation begun in August could not have been aimed at helping this movement — Mr. Reichler feigns ignorance of the fact that another Congolese rebel movement already existed in August 1998: the RCD — the *Rassemblement Congolais pour la Démocratie* —, to which Uganda has moreover expressly admitted providing support, at least political in the beginning, and military afterwards⁹¹. Further, Mr. Reichler contradicts himself when he states that Ugandan forces were welcomed, without resistance, in Bunia, on 12 August 1998, by a commander of the *Forces armées congolaises*⁹². The only “detail” which Uganda’s counsel neglects to mention in this connection is that the officer in question had mutinied against the authorities in Kinshasa and was therefore indeed a rebel, whom the UPDF forces were coming to assist. This is, moreover, exactly the same situation which was to prevail, according to Uganda itself, in Kisangani a few days later.

IV. The presence of Ugandan armed forces in Kisangani from 1 September 1998 onwards indeed confirms the thesis of aggression

9. Kisangani. 1 September 1998. Here again, it would be fruitless to search for an association of these terms in Uganda’s written pleadings. Not one word from the other Party on the presence of its troops in Kisangani, 650 km from the Ugandan border, from 1 September 1998 onwards. Not one word, in any event, before the moment when Uganda was forced to admit to this presence, once again because of documents and testimony gathered in the Porter Commission enquiry.

⁹¹See the testimony of H.E. Amama Mbabazi before the Porter Commission, appearing in RU, pp. 68-69, para. 157.

⁹²CR 2005/6, p. 36, para. 56 (Mr. Reichler).

10. But, as we now know, our opponents are quick to adapt to new circumstances. And they find an explanation for everything. Thus, it was by invitation of the Rwandan army and the Congolese rebels that, depending on the version, a few soldiers (according to Mr. Reichler's statement of 15 April⁹³) or a Ugandan battalion (according to the statement by the same counsel of Uganda on 27 April⁹⁴) arrived in Kisangani to secure the airport. That airport allegedly was — even though Uganda “forgot” to mention it in its written pleadings — a “major delivery point for the DRC Government and Sudanese arms and ammunitions to the ADF and other rebel groups”. For Uganda, assuredly, all invitations, all consents are equally valid, whether issued by the official government of a State, a foreign army which has invaded the territory of another State, or even a rebel group. As for the justification offered by the other Party for its presence in Kisangani, the least that can be said is that it is puzzling. Thus, was it because Uganda feared that the Rwandan army or the Congolese rebels — who were at that time, lest we forget, Uganda's closest allies in the Congo — would allow the Kisangani airport to be used to supply Ugandan rebel groups that Uganda felt a pressing need to despatch its own forces there? Once again, the scenario described by Uganda proves very shaky.

33

11. Two further comments are necessary on this point. First, Uganda has never claimed during the present oral phase of the proceedings that the UPDF forces deployed in Kisangani came from the Congo. On the contrary, all indications are that they came directly from Uganda itself, as shown by the document setting out the various stages of Operation “Safe Haven”, already presented to the Court several times and found under tab 40 in the judges' folder submitted by the Democratic Republic of the Congo. Against the reference to Kisangani, this document bears the notation “3BN arrival”, that is “arrival of the third battalion”. But this battalion is mentioned nowhere in connection with the operations in Beni, Bunia and Watsa in Congolese territory in the preceding weeks. Thus, it did indeed arrive directly from Uganda, which contradicts, once again, the other Party's argument that no troops were sent into the Congo before mid-September 1998. Secondly, the fact that Kisangani, like Bunia before it, was occupied by the UPDF without a fight in no way makes Uganda's military deployment any less an invasion and act of aggression, as the

⁹³*Ibid.*, CR 2005/14, p. 22, para. 45.

⁹⁴*Ibid.*

other Party would appear to argue⁹⁵. It will first be noted on this point that, as a matter of fact, the advance of the UPDF troops through other parts of the eastern Congo during August 1998 was marked by a great deal of fighting, as attested to, in particular, by the statements given by Congolese officers who were then present in the area⁹⁶. Most importantly, as a matter of law, it is important to recall that there is aggression where armed forces in significant numbers are present without invitation in foreign territory, whether or not fighting is involved⁹⁷.

V. 11 September 1998 was not the date on which Uganda's military engagement in the Democratic Republic of the Congo began

34 12. A final point in the chronology of events which we have just reviewed warrants mention. That is the famous position statement by the UPDF on 11 September 1998, said to mark Uganda's decision to commit itself militarily in the Congo⁹⁸. The Democratic Republic of the Congo has pointed out that the very wording of this statement contradicts Uganda's contention, in that the statement sets out the decision to maintain UPDF forces in the Congo, not to send them there. Mr. Reichler attempted to elude this point, explaining that "maintain" can mean "to keep in place" as well as to put someone or something in place and support them while they are there⁹⁹. In any event, he explained, it is not appropriate to quibble about word choice here, because the document was written by soldiers, not lawyers¹⁰⁰. But it is precisely for that reason that reliance should be placed, yet again, on the ordinary meaning of the words. And there is no doubt about the ordinary meaning. In a dictionary intended specifically for beginners, the primary meaning ascribed to the word "maintain" is "not change — to make a situation or activity continue in the same way"¹⁰¹. Two other meanings follow: to keep up a building or a space; and to stand by a position one has always taken ("he has always maintained that he was innocent")¹⁰². Here again, the rather convoluted explanation suggested by Mr. Reichler thus accords very badly with the ordinary

⁹⁵CR 2005/14, p. 23, para. 46 (Mr. Reichler).

⁹⁶See, *inter alia*, RDRC, Anns. 51, 52 and 53.

⁹⁷See Article 3, resolution 3314 (XXIX) of 14 December 1974, defining aggression.

⁹⁸CMU, Ann. 27.

⁹⁹CR 2005/14, p. 27, para. 55 (Mr. Reichler).

¹⁰⁰*Ibid.*

¹⁰¹*Cambridge Learner's Dictionary*, CUP, 2001, p. 393.

¹⁰²*Ibid.*, pp. 393-394.

meaning of the words. And, ultimately, Uganda's thesis of a "turning point on 11 September 1998" would appear groundless. I shall note further, as a final point in this respect, that the other Party has failed to offer anything in response to the DRC's argument that the wording of this declaration is very difficult to reconcile with Uganda's claim of self-defence. It should be recalled that the first objective of the operation was defined as follows: "to deny the Sudan the opportunity to use the territory of the DRC to destabilize Uganda"¹⁰³. It was therefore not in the least a matter of responding to an alleged attack on Uganda, but rather of precluding such an attack from Congolese territory in the future.

35 13. In all respects, the argument that the Democratic Republic of the Congo found itself in a position of self-defence from August 1998 onwards is thus fully supported. Even assuming that the Congo could be blamed for hostile acts against Uganda during this period — which, I shall repeat one last time, has never been established —, those acts could therefore be justified as exercises of the right of self-defence, and the Congo's international responsibility thus could not be engaged as a result. For all of the reasons which have been set out this morning, the Democratic Republic of the Congo therefore respectfully requests the Court to reject Uganda's first counter-claim. I thank the Court once again for its attention and ask you, Mr. President, to give the floor to Professor Jean Salmon, so that he may briefly reply to the other Party's argument concerning the second counter-claim.

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

Mr. SALMON: Thank you, Mr. President.

UGANDA'S SECOND COUNTER-CLAIM

1. Mr. President, Members of the Court, it now falls to me to respond to the arguments presented by my colleague and friend Eric Suy on Uganda's second counter-claim. I will not return to what was said a moment ago by Maître Tshibangu Kalala concerning the admissibility of the preliminary objections raised by the Democratic Republic of the Congo.

¹⁰³CMU, Ann. 27.

I. Inadmissibility for lack of connection

2. I will begin with the argument of the Democratic Republic of the Congo that Uganda's second counter-claim is inadmissible because it lacks connection with the principal claim, being based on a violation of the Vienna Convention on Diplomatic Relations.

36 Eric Suy contended that the DRC's argument was misconceived, because it founded Uganda's claims on paragraphs 405 to 408 of the Counter-Memorial without taking account of paragraph 402, which cited the Vienna Convention three times. Unfortunately his reasoning does not hold water, because it confuses the paragraphs of the Counter-Memorial which contain Uganda's *claims per se* and the *explanatory* paragraphs which precede them. The Vienna Convention is admittedly cited in a letter of protest dated 18 December 1998 from the Ugandan Minister for Foreign Affairs, which appears in an explanatory paragraph concerning the attack on the Embassy and the Chancery, that is to say in paragraph 402. However, that paragraph — I repeat — is not one of those in which Uganda's claims are actually set out.

That view is not a figment of the imagination or a ploy by the Democratic Republic of the Congo; it is the *official* position of Uganda. The Respondent, when requested to clarify what its *claims* were exactly, expressly clarified the matter in paragraph 6 of its Written Observations of 15 August 2001, stating therein that "the counter-claims are set out in the Counter-Memorial in appropriate sequence, as follows . . .".

In its Observations, Uganda goes on to cite paragraph 379, which enumerates the principles of international law allegedly violated by the DRC, and then, with respect to the section concerning the attack on the Embassy, refers *solely* to paragraphs 405 to 408¹⁰⁴. There is no mention of the Vienna Convention in any of those paragraphs.

It is sometimes helpful for a party to read its own pleadings.

The argument concerning the use of the expression "rules of conventional international law" in the Court's Order of 29 November 2001 is not pertinent either, because the Court, in that context, was not referring to the Vienna Convention but to international conventions, in particular of humanitarian law, as they apply to individuals in the case of armed conflict.

This, we hope, settles the issue of the lack of connection.

¹⁰⁴“Written Observations of the Republic of Uganda on the question of the admissibility of the counter-claims made in the Counter-Memorial of the Republic of Uganda of 21 April 2001”, pp. 2,3,4 and 5.

II. Inadmissibility of diplomatic protection

3. The Democratic Republic of the Congo further contends that the claims of the Republic of Uganda are inadmissible because of a failure by the so-called Ugandan nationals to fulfil the condition of nationality and to exhaust local remedies.

37 With respect to the individuals whose claims Uganda has espoused, it is quite incorrect to contend that the Ugandan claims make a proper distinction between Ugandan nationals and diplomats. This confusion pervades the Ugandan pleadings and never has La Fontaine been more appropriately cited, for it is impossible to determine whether Uganda seeks to defend the mice or the birds.

With all due respect to our friends on the other side of this Hall, the status of the individuals concerned is never specified. They are all covered by the single expression in the Counter-Memorial “diplomatic personnel and nationals”, in paragraphs 397 and 399, as well as in Annex 23 to that pleading. In the Reply, those nationals are magically transformed into the “individual victims . . . on the scene in their role as members of the Ugandan mission, or as family members, or as staff of the mission”¹⁰⁵. Those individuals are again combined in the single expression “diplomatic personnel and nationals” in Uganda’s Written Observations of 15 August 2001 (para. 60).

III. The claims are unfounded

4. The Democratic Republic of the Congo further contends that the claims of the nationals are not set out explicitly and that those of the Ugandan State are, on the merits, entirely fanciful.

This can be said, for example, of the vehicles whose official or private status, as well as their quantity, seems to vary in a surprisingly casual way: four Embassy vehicles (Ugandan Counter-Memorial, para. 400) and four private vehicles belonging to Ugandan nationals (Ugandan Counter-Memorial, para. 401); four Embassy vehicles and four private vehicles under the protection of the Embassy, according to Annex 33 of the same Counter-Memorial. When you add them up, that makes eight vehicles. However, in Annex 92 to the Counter-Memorial, there are only two official vehicles and two private vehicles (“belonging to a Ugandan” and thus not to a

¹⁰⁵RU, p. 325, para. 703.

diplomatic official). In the Reply, we again find four vehicles but they are reclassified as official in paragraph 680! All this is hardly very serious.

38 The Republic of Uganda did not hide the fact that it submitted counter-claims in order to embarrass the Democratic Republic of the Congo. It would have been wiser to have left this second series of counter-claims to follow its normal course: any aggrieved Ugandan nationals should be advised to come forward, substantiate their claims and bring them before the courts of the Democratic Republic of the Congo¹⁰⁶.

As for the claims concerning official buildings of the Ugandan State, it has been known for some time that there was no expropriation and that the buildings are not in a ruinous state as has been claimed — the Court has been able to see this for itself in the photos reproduced in the Reply of the Democratic Republic of the Congo¹⁰⁷. The most reasonable thing would be to leave this issue to be settled through the negotiations already underway between the two Parties. A joint status report has already been drawn up for the buildings in Kinshasa. The residence is in good condition and the Embassy needs certain repairs, albeit minor ones. The Republic of Uganda has requested the DRC to provide it with an estimate for the refurbishment of the premises. For its part, the Democratic Republic of the Congo is seeking settlement of its claim against Uganda, following the public auctioning of the three buildings of the diplomatic mission of the Democratic Republic of the Congo in Kampala¹⁰⁸.

5. Mr. President, Members of the Court, that brings to an end the last presentation before you by counsel for the Democratic Republic of the Congo. Before closing, I would like to express, on behalf of the entire team of the Democratic Republic of the Congo, our gratitude to the Court for the attention that it has kindly given to our oral statements. We would also like to thank all the Registry staff and the interpreters, who have so courteously and expertly assisted us throughout these three weeks of oral proceedings.

¹⁰⁶RDRC, p. 380-381, para. 6.75-6.77.

¹⁰⁷*Ibid.*, p. 390.

¹⁰⁸See *ibid.*, pp. 395 and 396 and Ann. 107.

I would be grateful, Mr. President, if you would kindly give the floor to Ambassador Jacques Masangu-a-Mwanza, in his capacity as Agent, for his presentation of the submissions of the Democratic Republic of the Congo on the Ugandan counter-claims.

The PRESIDENT: Thank you, Professor Salmon. I now give the floor to His Excellency Mr. Jacques Masangu-a-Mwanza, the Agent of the Democratic Republic of the Congo.

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Mr. MASANGU-A-MWANZA: Mr. President, I should like to begin by thanking you.

Submissions of the Democratic Republic of the Congo

Mr President, Members of the Court, as these oral proceedings draw to a close, I would like, in a few words, to remind my colleague Khiddu Makubuya, Agent of Uganda, that in African culture all conflicts between communities have traditionally been settled under a “palaver tree” that in Africa we call the “baobab”.

The baobab, for you and for us, is at this moment the International Court of Justice, principal judicial organ of the United Nations, called upon to state the law in the conflict between our two States.

The fact that we are appearing before the Court does not mean that our two countries are enemies. On the contrary, we are in the process of settling the dispute between us by peaceful means.

I will now read out the submissions of the Democratic Republic of the Congo.

The Congo requests the Court to adjudge and declare:

As regards the *first counter-claim submitted by Uganda*,

1. To the extent that it relates to the period before Laurent-Désiré Kabila came to power, Uganda’s claim is inadmissible because Uganda had previously renounced its right to lodge such a claim: in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
2. To the extent that it relates to the period from the time when Laurent-Désiré Kabila came to power to the time when Uganda launched its armed attack, Uganda’s claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;

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3. To the extent that it relates to the period subsequent to the launching of Uganda's armed attack, Uganda's claim is unfounded both in fact and in law because Uganda has failed to establish the facts on which it is based and, in any event, from 2 August 1998 the DRC was in a situation of self-defence.

As regards the *second counter-claim submitted by Uganda*:

1. To the extent that it now relates to the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim submitted by Uganda radically changes the subject-matter of the dispute, contrary to the Statute and to the Rules of Court; that part of the claim must therefore be dismissed from the present proceedings;
2. That part of the claim relating to the alleged mistreatment of certain Ugandan nationals remains inadmissible because Uganda has still failed to show that the requirements laid down by international law for the exercise of its diplomatic protection were satisfied; in the alternative, that part of the claim is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.
3. That part of the claim relating to the alleged expropriation of Uganda's public property is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.

Mr. President, my Government thus rejects the two counter-claims. Thank you.

Le PRESIDENT : Je vous remercie, Excellence. La Cour prend acte des conclusions finales dont vous avez donné lecture au nom de la République démocratique du Congo concernant les demandes reconventionnelles de l'Ouganda, tout comme elle a pris acte, le lundi 25 avril, des conclusions finales du Congo concernant ses propres demandes et, le mercredi 27 avril, des conclusions finales présentées par l'Ouganda.

Voilà qui nous amène à la fin de ces trois semaines d'audiences consacrées aux plaidoiries orales en l'espèce.

Je tiens à adresser mes remerciements aux agents, conseils et avocats des deux Parties qui sont intervenus.

Conformément à la pratique, je prierai les agents de bien vouloir rester à la disposition de la Cour pour tous renseignements complémentaires dont celle-ci pourrait avoir besoin. Sous cette

41 réserve, je déclare close la procédure orale en l'affaire des *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*.

La Cour va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Cour rendra son arrêt.

La Cour n'étant saisie d'aucune autre question aujourd'hui, la séance est levée.

L'audience est levée à 11 h 40.
