

CR 2005/11 (traduction)

CR 2005/11 (translation)

Vendredi 22 avril 2005 à 10 heures

Friday 22 April 2005 at 10 a.m.

8 Le PRESIDENT : Veuillez vous asseoir. L’audience est ouverte. La Cour se réunit aujourd’hui pour entendre la fin du premier tour de plaidoiries de la République démocratique du Congo concernant les demandes reconventionnelles de l’Ouganda. Je donne donc la parole à M. Klein.

Mr. KLEIN: Thank you, Mr. President.

**THE FIRST UGANDAN COUNTER-CLAIM, IN RESPECT OF THE PERIOD BEFORE  
PRESIDENT KABILA CAME TO POWER, IS INADMISSIBLE AND,  
ALTERNATIVELY, UNFOUNDED**

1. Mr. President, Members of the Court, the response of the Democratic Republic of the Congo to Uganda’s counter-claims will be presented as follows:

- Professor Oliver Corten and myself will deal with the first Ugandan counter-claim, whereby Congo allegedly failed to fulfil its international obligations by using force against Uganda; in a moment, I will clarify the scope and subject-matter of each of these presentations;
- the second Ugandan counter-claim, whereby the Congo was allegedly guilty of ill-treatment of Ugandan nationals in Kinshasa in August 1998 and purportedly appropriated certain Ugandan property, will be addressed by Professor Jean Salmon and Maître Tshibangu Kalala; on a principal basis, Professor Salmon will show that the way in which this claim was initially presented and then modified by Uganda renders it inadmissible; on an alternative basis, Maître Tshibangu Kalala will set out the reasons why that second claim is unfounded.

9 2. The first Ugandan counter-claim, concerning the alleged use of force against Uganda by the Congo, is presented in broad terms and covers quite an extensive period of time. The “examples” of the use of force on which Uganda bases its claim extend from 1996 to 1999<sup>1</sup>. Those years in fact cover three different periods, corresponding to totally distinct factual and legal situations. The Congo thus finds it necessary to deal with those periods separately, even though the other Party seems, in its oral statement on the counter-claims, to have considered such separation quite unnecessary. The first of those periods corresponds to the end of Marshal Mobutu’s régime and runs up to May 1997, when President Laurent-Désiré Kabila came to power in Kinshasa. The

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<sup>1</sup>CMU, pp. 221-228, paras. 387-408; RU, pp. 302-311, paras. 655-674.

second period runs from May 1997 to early August 1998, corresponding to the time when President Kabila was actively collaborating with the Ugandan authorities in order to ensure security along the common border. The third period is that which followed the outbreak of the war in August 1998. Later on, Professor Corten will show that Uganda's first counter-claim, in respect of those last two periods, is totally unfounded. For my part, I will focus for the time being on the first of those periods, showing on a principal basis that this part of the claim is inadmissible on the grounds that it should be regarded as having been renounced by Uganda. In the alternative, it will be established that this claim is unfounded, because there is no evidence in the file to show that Zaire either attacked Uganda directly during that period or provided support for rebel groups which are said to have engaged in attacks against Ugandan territory from bases situated in Zairean territory. However, before embarking upon that demonstration, I wish to begin by clarifying our contention that, contrary to what Uganda has argued, the Democratic Republic of the Congo is perfectly entitled, at this stage of the proceedings, to raise preliminary objections against the counter-claims submitted by the Respondent.

**I. The Democratic of the Congo is justified in raising preliminary objections against Uganda's counter-claims**

10 3. The very principle of submitting preliminary objections to claims accepted as counter-claims has been disputed by Uganda in its last oral statement<sup>2</sup>. In its Rejoinder, the Respondent even saw fit to characterize the Congo's argument on this point as an "unacceptable and bizarre opinion . . . on the application of provisions of the Statute of the Court"<sup>3</sup>. It is thus necessary first to return to that question of principle and to remind Uganda of a number of basic procedural concepts. It will be recalled at the Court itself was at pains to do this, in a particularly instructive way, in the *Oil Platforms* case, where the question had arisen in the same terms. If I may, I would thus like to quote the relevant extract in full from the Judgment of 6 November 2003:

"The Court considers that it is open to Iran at this stage of the proceedings to raise objections to the jurisdiction of the Court to entertain the counter-claim or to its admissibility, other than those addressed by the Order of 10 March 1998. When in that Order the Court ruled on the 'admissibility' of the counter-claim, the task of the Court at that stage was only to verify whether or not the requirements laid down by

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<sup>2</sup>CR 2005/10, p. 29, para. 17 (Mr. Suy).

<sup>3</sup>RU, p. 284, para. 616.

Article 80 of the Rules of Court were satisfied, namely, that there was a direct connection of the counter-claim with the subject-matter of the Iranian claims, and that . . . the counter-claim fell within the jurisdiction of the Court. The Order of 10 March 1998 therefore does not address any other question relating to jurisdiction and admissibility, not directly linked to Article 80 of the Rules . . . The Court will therefore proceed to address the objections now presented by Iran to its jurisdiction to entertain the counter-claim and to the admissibility thereof.”<sup>4</sup>

The explanation is thus crystal clear and does not, I feel, call for further comment. The Democratic Republic of the Congo is thus fully entitled to submit preliminary objections to Uganda’s counter-claims.

4. However, in his oral statement on Wednesday, Professor Suy went on to say that the Congolese preliminary objections were unacceptable in any event, because they failed to meet the requirements of Article 79 of the Rules of Court<sup>5</sup>. This was apparently because they were allegedly not submitted in the form, or within the deadline, prescribed in that Article. The Democratic Republic of the Congo must confess that it has some difficulty in comprehending that criticism. It made the objections in question in its Reply, which indisputably constitutes the first written pleading following both the submission of counter-claims by Uganda in its Counter-Memorial and the Order whereby the Court ruled on the admissibility of those claims as counter-claims. It is thus difficult to see at what other point in time those objections should have been submitted. As it was unable to comply literally with Article 79, which does not expressly contemplate the submission of preliminary objections in respect of counter-claims, the Congo rigorously applied the principle of that provision, *mutatis mutandis*, to the situation with which it was confronted. The Democratic Republic of the Congo thus followed exactly the same approach as Iran in the *Oil Platforms* case. Thus there is no problem of form in the instant case.

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Having disposed of those preliminary issues, I would now like briefly to discuss the objection to admissibility submitted by the Democratic Republic of the Congo against the first part of Uganda’s first counter-claim.

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<sup>4</sup>Judgment of 6 November 2003, p. 210, para. 105.

<sup>5</sup>CR 2005/10, p. 30, para. 19 (Mr. Suy).

**II. The first Ugandan counter-claim, in respect of the period before President Kabila came to power, is inadmissible on the ground that it should be regarded as having been renounced by Uganda**

5. Mr. President, Members of the Court, the first Ugandan counter-claim, in respect of the period before President Kabila came to power, is inadmissible on the ground that it should be regarded as having been renounced by Uganda. Under Article 45, paragraph (b), of the Articles on State Responsibility adopted by the International Law Commission in 2001 “[t]he responsibility of a State may not be invoked if . . . [t]he injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim”. Our opponents dispute that argument, asserting that such a renunciation cannot be established with certainty, on the ground that Uganda never clearly expressed its intention not to follow up the protests it claims to have raised against certain conduct by Zaire towards the end of Marshal Mobutu’s presidency.

6. The elements which led the Democratic Republic of the Congo to conclude that Uganda had renounced its right to invoke the international responsibility of the Congo in respect of acts dating back to that period fall into two categories. On the one hand, even at the material time, Uganda never expressly imputed international responsibility to Zaire, and did not even express any intention of formally invoking such responsibility. On the other, and in any event, the relations which developed between the two States after President Kabila came to power, as well as their close collaboration, particularly in the area of security, led the Congolese authorities to believe, quite understandably, that Uganda had no intention of resurrecting certain allegations from the period concerned and of seeking to engage the Congo’s international responsibility on that basis.

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7. Regarding the first of those points, it should be recalled at the outset that Uganda, in the instant proceedings, has never produced the slightest document to confirm its allegations that it addressed direct protests to Zaire in reaction to the support allegedly given by that State to Ugandan rebel groups, or because of alleged attacks directly perpetrated by the Zairean army against Ugandan territory. Admittedly, as Professor Suy indicated in his statement on Wednesday, multilateral diplomacy does offer other instruments and other means of communication whereby such protests may be formulated<sup>6</sup>. But that still supposes, for our purposes, that a meaningful complaint was actually submitted and that responsibility was thus meaningfully imputed. Is that

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<sup>6</sup>CR 2005/9, para. 22 (Mr. Suy).

the case here? I will simply look at one of the letters addressed by Uganda to the Security Council in 1996, to which our opponents have drawn particular attention. That letter is accompanied by a communiqué, addressed to the Security Council for the information of its members and which seeks — it should be recalled — to address earlier allegations by Zaire of armed aggression on the part of Uganda. The relevant passage, in which Uganda comments on the presence of rebel groups in Zairean territory, reads as follows:

“An example of this is the time 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. UPDF assumed its constitutional responsibility of defending Uganda and flushed the enemy out of Ugandan 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.”<sup>7</sup>

**13** That is all. This is a far cry from a formal imputation of responsibility to Zaire, nor does it constitute the “notice” which may be expected of a State when it seeks to impute responsibility to another, according to Article 43 of the Articles on international Responsibility of States, adopted by the International Law Commission in 2001, which provides that “[a]n injured State which invokes the responsibility of another State shall give notice of its claim to that State”. Yet, the other documents referred to by Uganda contain no form of words which would go beyond the example I have just cited<sup>8</sup>. In the absence of any initial formal protests, the Zairean, then Congolese, authorities could not readily have imagined that Uganda intended to reserve the right to impute responsibility to the Zairean or Congolese State on account of those allegations. Moreover, subsequent developments in relations between the two States would lead the Congo to consider that, if it had ever intended to do so, Uganda had in any event renounced any right to invoke the responsibility of the Democratic Republic of the Congo for alleged violations of international law dating back to the period of Marshal Mobutu’s presidency.

8. It should thus be recalled that, as soon as President Laurent-Désiré Kabila came to power, relations between the Congo and Uganda were marked by very close co-operation, in particular in matters of security. The formal manifestation of that co-operation was the conclusion of an

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<sup>7</sup>Letter of 12 December 1996, doc. S/1996/1038, RU, Ann. 10.

<sup>8</sup>For further details, see AWODRC pp. 10-14, paras. 1.12-1.18.

14 agreement pertaining to the training by Uganda of members of the DRC police force<sup>9</sup> and, even more significantly, by the conclusion of the April 1998 Protocol on Co-operation for the purposes of security along the common border<sup>10</sup>, which has already been extensively referred to during the present proceedings. That co-operation was also manifested physically on the ground, with the presence on Congolese territory of Ugandan troops and the organization of joint military actions to enhance security in the border zone. As Mr. Brownlie quite rightly observed in one of his statements last week with respect to that period, “[t]he evidence of the close co-operation between the two States in the context of public order is palpable”<sup>11</sup>. It is precisely that context of close co-operation which led the Democratic Republic of the Congo to believe that Uganda had clearly renounced any intention of engaging the responsibility of the Congo for the acts now in question, assuming that is, as I have already said, that Uganda ever had the intention of doing so — and that is far from being established.

9. There is certainly no question here of presuming any renunciation by Uganda or of inferring it simply from the passage of time, as Professor Suy seemed to suggest the day before yesterday<sup>12</sup>. The Democratic Republic of the Congo was led to that conclusion by far more than the passage of time, in fact by the context of the relations between the two States. To be sure, a renunciation cannot be presumed. However, like consent, it may be expressed explicitly or implicitly, provided in the latter case that it can be considered as certain.

10. Professor Crawford, in his Third Report on State Responsibility, indicated that the “decisive factor” to be taken into consideration in order to assess the reality of a renunciation to submit an international claim was the fact that “the responsible State could reasonably have believed that the claim would no longer be pursued”<sup>13</sup>. Is this not precisely the situation in which the Congo found itself in the present case? Could it reasonably have expected that Uganda would submit an international claim against it on account of acts dating back to the Mobutu period, when Uganda had never formally sought to engage the responsibility of Zaire for those acts at the time

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<sup>9</sup>CMU, Ann. 16.

<sup>10</sup>CMU, Ann. 19.

<sup>11</sup>CR 2005/8, para. 19 (Mr. Brownlie).

<sup>12</sup>CR 2005/10, para. 23 (Mr. Suy).

<sup>13</sup>Doc. A/CN.4/507/Add 2, p. 16, para. 259.

15 they allegedly took place? Could the Congo reasonably expect that Uganda would submit an international claim against it on account of the acts in question, when Uganda expressly justified its military intervention in Zaire in 1996 to 1997 on grounds of self-defence in reaction to the very attacks which are now said to underpin the Ugandan claim? Counsel for Uganda has admittedly denied this latter contention several times during the present proceedings<sup>14</sup>. However, it suffices to recall the speech given by the Ugandan Minister for Foreign Affairs to the United Nations General Assembly in March 1999 to understand that this abrupt denial is hardly credible. The name of the Minister in question will doubtless be familiar to Members of the Court, since it was His Excellency Amama Mbabazi, who took the floor earlier this week. Remaining faithful to what seems to have become a Ugandan tradition of modesty when one considers the extent of the use of force by that country, a few days ago Mr. Mbabazi attributed all the credit for the overthrow of President Mobutu to the Rwandan army alone<sup>15</sup>. Here, by contrast, is what he stated before the General Assembly in March 1999:

“The Uganda government decided to act in self-defence by first recapturing the territory these criminal elements [Ugandan rebel groups] had occupied and followed them in hot pursuit into Zaire, as we were fully empowered to do under Article 51 of the United Nations Charter. It was an act of self-defence against the Democratic Republic of the Congo-based [in fact Zaire-based] rebels, which was undertaken with regional and international understanding and support, that resulted in the fall of President Mobutu. President Kabila was a direct bi-product of this process.”<sup>16</sup>

Thus, on its own admission, Uganda provided military support from the outset to Laurent-Désiré Kabila’s rebellion with a view to bringing him to power. If it had wished to present any complaint for actions attributable to the former Zairean régime, Uganda could have been expected to have immediately made such complaints to the new Government. It did no such thing.

11. Lastly, and above all, could the Congo reasonably have expected that Uganda would submit an international claim against it in respect of those facts, when a particularly close co-operation had developed between the two States, precisely in matters of security, with the Congolese authorities going as far as accepting significant contingents of Ugandan troops on their

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<sup>14</sup>CR 2005/6, pp. 23 and 24, paras. 24-27 (Mr. Reichler).

<sup>15</sup>CR 2005/7, p. 40, para. 16 (Mr. Mbabazi).

<sup>16</sup>General Assembly, Fifty-third Session, 95th Plenary Meeting, 23 March 1999, doc. A/53/PV.95, CMU, Ann. 42, p. 14.

territory? How could the Congolese authorities have suspected that this active co-operation policy would leave intact any intention that Uganda may have harboured — and indeed carefully concealed — to engage, at any time, the responsibility of its new partner on account of acts allegedly committed several years earlier?

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12. All of these elements clearly come together to justify the belief — and a highly reasonable one at that — of the Congolese authorities that Uganda had definitely renounced any intention to engage the responsibility of the Congo for the acts in question, which dated back to the Mobutu period. The recognition of renunciation as a ground for inadmissibility of an international claim can above all be explained by a concern for legal certainty and for stability in international relations. That objective would be totally undermined if a State which had never submitted any clear claim against another State in the past were allowed suddenly to submit such a claim, especially where it was based on matters in respect of which those States had in the meantime engaged in close co-operation.

13. All of these elements now serve to render inadmissible this first part of Uganda's first counter-claim, since Uganda should be regarded as having implicitly, but definitively, renounced any such claim. It is thus on a purely alternative basis that I will now seek to show, to conclude my statement, that the first Ugandan counter-claim, in respect of the period before President Kabila came to power, is devoid of foundation.

**III. In the alternative, the first Ugandan counter-claim, in respect of the period before President Kabila came to power, is devoid of foundation**

14. This question will be addressed very briefly, since the main observation to be made here, when one considers that initial period, is that the judicial debate concerning it has reached a stalemate. In its opening statement, theoretically devoted to a summary of the available evidence, Uganda mentioned no more than two documents, that is to say, Annexes 60 and 62 to its Counter-Memorial<sup>17</sup>. And in its oral argument on the counter-claims, Professor Suy, for his part, referred in very general terms to Uganda's Counter-Memorial and its annexes<sup>18</sup>. However, the Democratic Republic of the Congo showed in great detail, in its Reply, which was filed — it

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<sup>17</sup>CR 2005/6, pp. 20 and 22, paras. 15 and 20 (Mr. Reichler).

<sup>18</sup>CR 2005/10, para. 5 (Mr. Suy).

should be recalled — almost three years ago now, why those documents, emanating unilaterally from Uganda, fail to meet the judicial standard of proof<sup>19</sup>. Uganda chose not to respond to those criticisms in its Rejoinder, as the Democratic Republic of the Congo was at pains to point out in its Additional Observations on the counter-claims<sup>20</sup>.

15. However, during the present oral proceedings, Uganda has confined itself to citing those documents once again, without ever mentioning the criticisms of the Congo, and still less responding to them. One can thus only hope that our opponents will deign to provide some response to those criticisms during their next round of oral argument. It will be recalled that the main criticisms put forward by the Democratic Republic of the Congo stem from the fact that the only documents presented by Uganda as evidence of support by the Zairean Government for Ugandan rebel groups, or as evidence of the involvement of Zairean armed forces in the activity of those groups, consist in statements purported to have been made by former members of the ADF or other rebel groups who were captured by or surrendered to the Ugandan army. Annexes 60 and 62 contain documents prepared in the year 2000. Those documents are not signed and bear no indication (such as official stamps or seals) to provide confirmation of their precise date of issue. Their contents, with respect to the points on which Uganda seeks to base its arguments, are particularly vague.

16. Thus, the information which was allegedly provided by an ADF deserter, given in the document produced as Annex 60 to the Counter-Memorial, and which Mr. Reichler particularly highlighted in his first statement, is limited to the following: “In 1996 during Mobutu era before Mpondwe attack, ADF received several weapons from Sudan Government with the help of Zaire Government.”<sup>21</sup> That is the only reference at all, in this document which contains no less than 15 pages, to the support allegedly provided by the Zairean authorities to the Ugandan rebels. And it is on the faith of such imprecise and vague information, gathered in the circumstances that I have just recalled, that Uganda presented its first counter-claim against the Congo. It might

18 appropriately be recalled at this stage that those particularly brief and vague statements are not

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<sup>19</sup>RDRC, pp. 193-197, paras. 3.95-3.103; pp. 359-362, paras. 6.26-6.34.

<sup>20</sup>AWODRC, p. 20, para. 1.25; p. 23, para. 1.30.

<sup>21</sup>CMU, Ann. 60, p. 6.

contemporaneous with the facts they purport to relate. It is especially appropriate to recall that they are not confirmed by any neutral or external source whatsoever. The outside witnesses to the situation in Central Africa in the autumn of 1996 are far from confirming the picture painted by Uganda of attacks plotted and perpetrated by Zaire against Uganda during that period. Those witnesses report a quite different picture, as shown, for example, in this extract from a letter from the United States Secretary of State, Mr. Warren Christopher, to his Zairean counterpart in late 1996: "When Rwandan troops entered Goma and Bukavu in October and Ugandan troops entered North Kivu in November we categorically recommended their immediate withdrawal to avoid escalation of the conflict."<sup>22</sup> Thus it is Uganda which is presented as the State attacking Zaire and not the other way around. As we have already pointed out, it was in fact Zaire which complained to the Security Council of an attack by Uganda and not the opposite. Once again, Uganda is seeking to rewrite history.

17. Uganda's first counter-claim, in respect of the period before President Kabila came to power, thus proves to be totally unfounded. No serious evidence has been adduced by our opponents in support of their allegations. The few documents that they have produced for that purpose, in annexes to their written pleadings, do not appear to meet the minimum standards of reliability expected of such evidence. Their contents are imprecise. And above all, they remain unsubstantiated by any external or neutral source whatsoever. It is for these reasons that, if the Court were nevertheless to consider this first part of the claim admissible, the Democratic Republic of the Congo would request it to find that claim unfounded.

19 As my colleague Professor Olivier Corten will now show you, the first Ugandan counter-claim is equally devoid of foundation with respect to the following two periods, which begin respectively with the coming to power of President Kabila and with the start of the war in August 1998. I would thus ask you, Mr. President, if you would kindly give the floor to Professor Corten. I would like to thank the Court for its attention.

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

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<sup>22</sup>RDRC, Ann. 101.

Mr. CORTEN: Thank you, Mr. President.

**THE FIRST COUNTER-CLAIM IS WITHOUT FOUNDATION AS REGARDS THE TWO PERIODS  
SUBSEQUENT TO THE COMING TO POWER OF PRESIDENT KABILA: THAT PRECEDING  
AND THAT FOLLOWING THE OUTBREAK OF WAR IN AUGUST 1998**

1. As Professor Klein just mentioned, it now falls to me to deal with the two other periods concerned by Uganda's first counter-claim. First, the period beginning with President Kabila's assumption of power in May 1997, and ending with the commencement of Uganda's armed attack at the beginning of August 1998. Secondly, the period subsequent to early August 1998, that is to say the period during which the DRC was in a situation of self-defence. In what follows, I shall deal with each of these two periods in turn.

**1. The DRC did not violate its international legal obligations to Uganda between May 1997 and August 1998**

2. Out of concern not only to substantiate its counter-claim, but also to justify its invasion of the Congo at the beginning of August 1998, Uganda has sought to demonstrate that it had been the victim of a prior armed attack. The DRC obviously did not ignore these charges during the first round of oral argument. It was thus with some astonishment that it heard counsel for Uganda claim that the period preceding the month of August 1998 "was ignored completely by the representatives of the DRC during their three days at the podium"<sup>23</sup>. In fact, the DRC laid stress on the fact that Uganda had failed to provide evidence of Congolese involvement in any military attack *prior to* the beginning of August<sup>24</sup>.

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3. This absence of evidence has been challenged in relation both to the alleged links between the Congo and Ugandan rebels and to the hypothesis of a plot between the Congo and the Sudan. Having listened attentively to our opponents, the DRC is obliged to note that this total lack of evidence persists with regard to both issues.

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<sup>23</sup>CR 2005/6, 15 April 2005, p. 32, para. 48 (Mr. Reichler).

<sup>24</sup>CR 2005/3, pp. 32-33, paras. 10-13 (Mr. Corten).

**A. Uganda has not demonstrated the existence of military support by the DRC for Ugandan rebel groups**

4. Mr. President, Members of the Court, at this stage in the proceedings, Uganda has still not demonstrated that, at the beginning of August 1998, the Congo was guilty of any support for the Ugandan rebel forces. A few days ago, counsel for Uganda reeled off a list of the various Ugandan rebel groups that had been operating from Congolese territory<sup>25</sup>. They also dwelt on various actions by those groups, providing details of some of their military activities<sup>26</sup>. The DRC has never denied these facts, and it is therefore surprised at their being repeated so insistently. On the other hand, it has always denied that it provided military support for Ugandan rebel groups or participated in their military operations in any manner whatsoever. For the sake of clarity on this issue, I should like to make five points.

**1. No attack was carried out by the Congolese army on Ugandan territory**

5. First point. No attack was carried out by the Congolese army on Ugandan territory. This point is not disputed by Uganda. But it is very important to repeat it at this stage. No tank, no weapon, no soldier of the Congolese armed forces crossed the border between the Congo and Uganda, whether in early August 1998 or in the preceding months. Officially, however, it was in “response” that the Ugandan army, for its part, did indeed penetrate Congolese territory by air and by land, in order to invade and subsequently occupy almost one-third of that territory.

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**2. No attack was carried out by Ugandan rebel forces acting as *de facto* agents of the Congo**

6. This brings me to my second point: no attack was carried out by Ugandan rebel forces acting as *de facto* agents of the Congo.

7. Last Monday, one of Uganda’s counsel claimed that “the Government of the DRC co-ordinated the military operations of the ADF against Uganda, through senior officers of the Congolese armed forces, the FAC, who planned and supported cross-border attacks by the ADF in and against Uganda”<sup>27</sup>. He went on to cite not only the attacks at Kichwamba and Kasese, but also those at Kanyamura, on 10 June 1998, at Banyangule on 26 June 1998 and at Kiburara, on

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<sup>25</sup>CR 2005/7, pp. 9-11, paras. 3 and 4 (Mr. Brownlie).

<sup>26</sup>*Ibid.*, p. 11, para. 8 (Mr. Brownlie).

<sup>27</sup>*Ibid.*, p. 20, para. 38 (Mr. Brownlie).

5 July 1998<sup>28</sup>. The same counsel finally repeated that “[t]he attacks were carried out by groups supported by the central Government of the Congo and acting as its agents”<sup>29</sup>.

8. Mr. President, Members of the Court, these extremely serious accusations had been dropped in Uganda’s most recent written pleadings<sup>30</sup> and were not repeated in Uganda’s oral arguments devoted specifically to the counter-claims<sup>31</sup>. Be that as it may, what should be emphasized is that these accusations are accompanied by no references of any kind, other than to the Ugandan Counter-Memorial. The Congo pointed out some time ago, in the context of its Reply, that the only three documents produced by Uganda to prove that the Congolese authorities were involved in the attack at Kichwamba made no mention of it having been directed or controlled by agents of the DRC<sup>32</sup>. In fact, a reading of these documents reveals only references to the ADF, but no mention whatsoever of the Congolese authorities. As for the other four attacks cited by one of Uganda’s counsel, *no* document, *no* testimony, *no* evidence was produced to support the argument that the Congo directed or controlled the groups which carried out those attacks. No proof, therefore, either in the oral or the written pleadings.

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9. Mr. President, Uganda is not entitled to confine itself to unsubstantiated allegations, ignoring the responses already made to them by the Congo in its written pleadings. As counter-claimant, it must prove the existence of wrongful acts attributable to the Congo. And if it relies on the theory of *de facto* agents, it must comply with the very strict standards laid down by Article 8 of the International Law Commission’s Draft Articles on State Responsibility of 2001. It is thus not enough simply to assert that the Ugandan rebel groups are *de facto* agents of the DRC<sup>33</sup>. That must be proved, on the basis of evidence.

### **3. The Congo was not involved in any attack carried out against Uganda**

10. This brings me to a third and equally decisive point; Uganda has totally failed to demonstrate not only that the rebel groups were its *de facto* agents, but also that the Congo had

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<sup>28</sup>CR 2005/7, p. 27, para. 66 (Mr. Brownlie).

<sup>29</sup>*Ibid.*, p. 27, para. 67 (Mr. Brownlie)

<sup>30</sup>CR 2005/3, pp. 32-33, paras. 10-11 (Mr. Corten).

<sup>31</sup>CR 2005/10, paras. 29 and 70 (Mr. Suy).

<sup>32</sup>CMU, Anns. 82, 20, 91, criticized in RDRC, pp. 366-367, paras. 6.40-6.42.

<sup>33</sup>CR 2005/7, p. 20, para. 39 (Mr. Brownlie).

planned, prepared or participated in a single attack in any manner whatsoever. As I have just mentioned, the only three documents cited in the Ugandan written pleadings do not even mention the Congolese authorities, but only refer to Ugandan rebel elements. Here again, the counter-claimant's accusation is purely gratuitous.

11. It may also be asked whether Uganda is still really pursuing this charge. In his oral argument last Friday, counsel for Uganda asserted, with reference to an alleged attack of 6 August 1998, to which I shall return shortly, that “[t]his was the first time Congolese soldiers operated jointly with Ugandan rebels and attacked Ugandan forces”<sup>34</sup>. According to Uganda, then, this was the first time. From this, it may be concluded that, according to Uganda itself, the Congo was never involved in any attack carried out by Ugandan rebels prior to 6 August 1998.

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#### **4. The Congo never gave military support to Ugandan irregular forces**

12. What, then, was the wrongful act allegedly committed by the Congo? According to Uganda, the Congo violated international law by giving military support to Ugandan rebel groups. General military support, unrelated to any attack, but military support all the same. Last Monday, one of Uganda's counsel hammered home the argument of “logistical support, weapons, training and financial assistance directly from the Government of the Congo”<sup>35</sup>.

13. However, and this brings me to my fourth point, the Congo has not provided such support to Ugandan irregular forces. Once again, what evidence is supplied by Uganda in support of these serious charges? *No* evidence was cited in its oral argument, and in particular in the passage I have just cited. Nor did counsel for Uganda see fit to respond to the detailed critical analysis of the few documents cited in Uganda's Counter-Memorial and Rejoinder — developed by the Congo in its Reply<sup>36</sup> and subsequently in its Additional Observations on the Ugandan counter-claims<sup>37</sup>. Since Uganda has not responded to those criticisms, I would refer the Court to the written pleadings for fuller particulars of these.

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<sup>34</sup>CR 2005/6, p. 35, para. 53 (Mr. Reichler); emphasis added by the DRC.

<sup>35</sup>CR 2005/7, p. 20, para. 39 (Mr. Brownlie).

<sup>36</sup>RDRC, Chap. III, Sect. 1, and pp. 364-365, para. 6.36.

<sup>37</sup>AWODRC, pp. 38-42, paras. 1.53-1.60.

14. Mr. President, Members of the Court, Uganda is unable to impute any action whatsoever to the Congo that could be characterized as a wrongful act, whether in the form of an armed attack or a less serious use of force. No action, then, but could it be blamed for a culpable omission due to a lack of vigilance? This question I would answer with a fifth and final point: the Congo cannot be accused of culpable passivity in the face of Ugandan irregular forces operating from its territory.

**The Congo cannot be accused of culpable passivity in the face of the activities of Ugandan irregular forces operating from its territory**

24 15. As my colleague and friend Professor Klein has pointed out, Uganda acknowledges that the Congo took numerous steps to combat the Ugandan rebels, again between May 1997 and August 1998. The respondent State even places great emphasis on the sustained co-operation between the two countries during that period, in an attempt to deduce therefrom a form of consent to its presence on Congolese territory<sup>38</sup>.

16. Uganda is free to make its own arguments, but it cannot escape some of the consequences of that choice. If the Democratic Republic of the Congo was co-operating in the fight against the rebels, it cannot at the same time be accused of supporting those same rebels.

17. I should like to return once again to Uganda's oral arguments in these proceedings. Last Wednesday, one of Uganda's counsel referred to "a period of *entente* between the two countries (from May 1997 to July 1998)"<sup>39</sup>. In the same vein, last Friday, one of our distinguished adversaries, speaking on behalf of the Republic of Uganda, asserted that Uganda had rejected Rwanda's offer to join in the launching of the war in the Democratic Republic of the Congo at the beginning of August 1998, because:

"It was neither Uganda's policy, nor in her interest, to overthrow President Kabila and his Government. At the time, Uganda's only concern was securing her borders, and *until then President Kabila had been co-operating in that effort.*"<sup>40</sup> (Emphasis added.)

18. Clearly, therefore, Uganda can no longer dispute the fact that, at the beginning of August 1998, the Democratic Republic of the Congo was still co-operating with it in the effort to

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<sup>38</sup>CR 2005/8, pp. 10-12, paras. 12-19 (Mr. Brownlie); CR 2005/6, p. 11, para. 11 (Mr. Makubuya).

<sup>39</sup>CR 2005/10, p. 25, para. 6 (Mr. Suy).

<sup>40</sup>CR 2005/6, p. 42, para. 67 (Mr. Reichler).

ensure security along their common border. But in that case it can no longer claim that the Democratic Republic of the Congo was in breach of a duty of vigilance or due diligence vis-à-vis Uganda in relation to the security situation<sup>41</sup>. It is impossible at one and the same time to speak of a “period of *entente* between the two countries”, a state of co-operation which was accepted by the President of the Congo, and to claim that the Congo, during that same period of *entente*, violated the prohibition on the use of force to the detriment of Uganda.

25 19. Mr. President, Members of the Court, Uganda has been unable to prove any wrongful act on the part of the Congo, whether involving an act (direction of or participation in an attack, military support to Ugandan rebels), or an omission: lack of vigilance in the fight against those rebels. The second part of the Ugandan counter-claim must therefore be rejected, as must the allegation of an alliance between the Democratic Republic and the Sudan, again over the period from May 1997 to August 1998.

**B. Uganda has failed to prove the existence of a conspiracy between the DRC and the Sudan in the period prior to August 1998**

20. Having been unable to show that the Congo was involved in any way in the activities of the Ugandan rebel groups, Uganda is obliged to accuse someone else, in this instance the State of the Sudan. In order to implicate the Congo itself, however, it must then claim that the Sudan, the Ugandan rebels and the Congo concluded a sort of “diabolical pact” against it. The Court is familiar with this scenario. Several representatives of Uganda have aired different variations of it over the preceding days. I shall not, therefore, go back over each of the thrilling episodes of this plot.

21. There is just one question for us here. What are the features of the scenario we are offered for the critical period, the only one that interests us at this stage, the one preceding the start of the war on 2 August 1998? What precisely are the wrongful acts, as at that date, of which the Congo is accused? According to Uganda, the offence consisted of a meeting between the President of the Congo and the President of the Sudan in May 1998. During that month, an agreement

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<sup>41</sup>CR 2005/7, p. 30, para. 77 (Mr. Brownlie).

designed to destabilize Uganda is said to have been concluded<sup>42</sup>. It is this alliance which is claimed to constitute the wrongful act attributable to the Congo.

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22. In fact, however, neither the President's visit, nor — still less — the plot, has ever been proved by the Respondent. In their oral arguments, counsel for Uganda cited *no* document attesting to its existence. In its written pleadings, Uganda produced a total of two documents that are alleged to prove that that famous visit took place. The first is a speech delivered on 23 March 1999 to the United Nations General Assembly by the former Ugandan Minister for Foreign Affairs, Mr. Mbabazi, today an advocate for Uganda in the present proceedings<sup>43</sup>. The second document is an address by President Museveni himself to the Ugandan Parliament, on 28 May 2000<sup>44</sup>. That is all. You have thus heard the only "evidence" — if it can be described as such — presented by Uganda, consisting of speeches by its own political leaders. And this is supposed to substantiate one of the most serious accusations made against the Congo. It was in May 1998 that this "diabolical alliance" was allegedly forged. And it was from that month onwards that the hostile acts against Uganda were said to have intensified. Nevertheless, as we see, not a single document is adduced to confirm this scenario.

23. A few days ago, some of Uganda's counsel did — it is true — speak to you of Ugandan intelligence reports from well-placed agents inside the Sudan or the Democratic Republic of the Congo<sup>45</sup>. The intelligence services are said to have intercepted communications proving the existence of the diabolical tripartite conspiracy between the Congo, the Sudan and Ugandan rebels. A further episode in this scenario, worthy of the most gripping television spy series, occurred when the Ambassador serving in Kinshasa abandoned documents containing damning evidence against the Congo on the premises of his embassy (according to Uganda's Rejoinder) — an Ambassador who, incidentally, himself only recalled the existence of those documents several years later, more precisely at the time when the Rejoinder was being drafted<sup>46</sup>.

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<sup>42</sup>CMU, pp. 30-31, para. 39; CR 2005/6, pp. 29-30, paras. 42-43 (Mr. Reichler); CR 2005/7, pp. 12-13, para. 13 (Mr. Brownlie).

<sup>43</sup>*Ibid.*, Ann. 42.

<sup>44</sup>*Ibid.*, Ann. 66.

<sup>45</sup>CR 2005/6, pp. 29-30, para. 43; p. 37, para. 57 (Mr. Reichler).

<sup>46</sup>RU, p. 322, para. 695 and Ann. 87.

24. Mr. President, Members of the Court, no report of an intercepted communication has ever been produced by Uganda, whether in its Counter-Memorial, in its Rejoinder, or when new documents were filed prior to the present oral proceedings. Since the filing of the Congo's Application in June 1999, very nearly six years ago, Uganda has had ample time to gather and submit evidence in support of this allegation. To this day it has failed to do so.

27 Finally, moreover, we are bound to ask whether Uganda does still maintain its charge that the Democratic Republic of the Congo forged an aggressive alliance with the Sudan before the outbreak of the war on 2 August 1998. Thus, in its oral presentation specifically relating to the counter-claims, one of Uganda's counsel asserted that the alliance between the Congo, the Ugandan rebels and the Sudan had been established "*after* [the] period . . . from May 1997 to July 1998"<sup>47</sup> — that is to say, after July 1998. *A contrario*, this amounts to an admission that the alliance did not exist during that period, that is to say, before August 1998, which is the only period under consideration at this stage.

26. In conclusion, Mr. President, one fact must be noted. At the beginning of August 1998, there was absolutely no evidence to support the claim that the Congo had committed a wrongful act against Uganda by entering into an aggressive alliance with the Sudan. The essential — if not the main — component of the Ugandan argument is not substantiated, at this stage of the proceedings, by any evidence, however flimsy. Between May 1997 and August 1998, the Democratic Republic of the Congo never violated Uganda's rights, whether by directly carrying out an attack, by supporting rebel forces or by entering into an aggressive alliance with Sudan. The same conclusion can be drawn from an examination of the period following the commencement of the Ugandan aggression. This brings me to the second part of my presentation this morning.

## **II. The DRC did not violate its international legal obligations to Uganda after August 1998**

27. Mr. President, Members of the Court, the period we shall now consider is very different from the two preceding ones. From August 1998 the Democratic Republic of the Congo was in a situation of self-defence in the wake of an armed attack perpetrated by Uganda. Thus the Congo is

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<sup>47</sup>CR 2005/10, 20 April 2005, p. 25, para. 6 (Mr. Suy); emphasis added.

in any event entitled to plead self-defence to rebut the Ugandan counter-claim. But before developing this point, I should like simply to remind the Court that Uganda has been no more able to adduce evidence of a wrongful act against it by the Congo than it was for the preceding ones.

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**A. In reality, Uganda has still been unable to impute any wrongful act to the Congo**

28. In reality, Uganda's strategy still seems to be the same: making an assertion without providing a shred of evidence to support it. That is our opponents' constant practice, including with regard to the most decisive aspects of their argument — as I shall now show by means of three illustrations.

**1. The total lack of evidence that Ugandan rebels were incorporated into the FAC (Congolese Armed Forces)**

29. During the first round of argument, counsel for Uganda stated no fewer than eight times that at the beginning of August 1998 Ugandan rebel forces were incorporated into the Congolese Armed Forces (FAC)<sup>48</sup>. This claim is obviously of decisive importance, since it enables Uganda to impute to the Congo all subsequent acts by these rebel forces, who are considered to have become *de facto* agents, as it were, of the Democratic Republic of the Congo.

30. However, none of Uganda's counsel saw fit to cite any document capable of substantiating these claims. It is sufficient to review carefully the eight passages from their oral argument to which I have just referred (the references will of course be indicated in the written text of this presentation). Absolutely nothing will be found there, Mr. President, no reference to a document of any kind. This claim as to the incorporation of Ugandan rebels into the Congolese army is thus just a first illustration of the method practised by Uganda.

**2. The total lack of evidence of an attack on 6 or 7 August against the UPDF**

31. I now come to a second example. One of Uganda's counsel laid stress last week on an attack said to have been carried out against UPDF troops at the beginning of August. In his words: “[O]n 6 August 1998, the Ugandan forces near Beni were attacked by a combined force of ADF

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<sup>48</sup>CR 2005/6, p. 11, para. 12, p. 35, para. 53 (Mr. Reichler); CR 2005/7, p. 9, para. 3, p. 12, para. 13, pp. 19-20, para. 35, p. 28, para. 68 (Mr. Brownlie); CR 2005/10, p. 25, para. 6 and p. 28, para. 14. (Mr. Suy).

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and FAC soldiers loyal to President Kabila.”<sup>49</sup> This attack is claimed to have been a major turning point in the unfolding events, since, again according to the Ugandan scenario, it was in response to this attack that the UPDF, after fighting and defeating the enemy, rapidly took control of Beni and subsequently of Bunia<sup>50</sup>.

32. Mr. President, Members of the Court, in that oral statement Uganda for the first time clearly identified an armed attack imputable to the Congo, an attack said to have justified its military intervention. However, the attack in question was barely mentioned in the Counter-Memorial, which moreover gave its date as 7, not 6 August 1998<sup>51</sup>. Despite the importance attached to it today, this same attack was not mentioned even once in the Ugandan Rejoinder. A second counsel for Uganda, for his part, referred to it last Monday, but gave the date not as 6 August, like his predecessor, but as 7 August 1998<sup>52</sup>. Counsel for Uganda will doubtless manage to agree their position as to the date of this alleged attack in the latter part of these proceedings. However, it would be helpful if they would finally cite a document, or any piece of evidence, capable of substantiating their allegations. Neither the Counter-Memorial nor the first or second round of Uganda’s oral presentation, to which I have just referred, contains any evidentiary material. Nor is this famous attack even mentioned in the witness statements to the Porter Commission, which give an account of the early stages in the Ugandan military operation in the Congo. Once again, therefore, the decisive element of the counter-claimant’s argument rests solely on unilateral assertions, which it asks the Court to take as established facts without any further enquiry.

### **3. The complete lack of evidence of a conspiracy with the Sudan**

33. Now for the third example: the theory of a diabolical conspiracy involving the Democratic Republic of Congo, the Sudan and Ugandan rebels, this time for the period that began in August 1998, not for the preceding period — I already dealt with that just now. One of Uganda’s counsel has explained that this conspiracy, allegedly hatched, as we have seen, as early

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<sup>49</sup>CR 2005/6, p. 35, para. 53 (Mr. Reichler).

<sup>50</sup>*Ibid.*

<sup>51</sup>CMU, p. 37, para. 47.

<sup>52</sup>CR 2005/7, p. 43, para. 24 (Mr. Mbabazi).

30 as May 1998, was evidenced by other visits to the Sudan, specifically on 24 August and 18 September 1998<sup>53</sup>. This time the counter-claimant cites five documents in support of its claims, so these must be examined.

34. The first of these is simply a speech by the Ugandan Minister for Foreign Affairs, today appearing as counsel for Uganda, that I cited just now<sup>54</sup>. Three others are no more than documents prepared by the Ugandan authorities themselves regarding the situation in Congo<sup>55</sup>. These are not witness statements, they are mere reports. As to the fifth, this is the much-vaunted document of 11 September 1998, which has been described as “irrefutable proof” by Uganda<sup>56</sup> and can be found in your judges’ folder at tab 5<sup>57</sup>. This document, prepared unilaterally by the UPDF high command, has been cited three times by Ugandan counsel<sup>58</sup>, and I have no wish to do so in my turn. I note, however, that one of the aims of the decision to keep troops in Congolese territory was “to deny the Sudan the opportunity to use territory of the DRC to destabilize Uganda”<sup>59</sup>. “To deny the Sudan the opportunity to use”, not to put an end to the actual use of Congolese territory by the Sudan, whether by way of attacks by the Sudanese army or even by supporting Ugandan rebel groups. So much for Uganda’s much-vaunted evidence.

31 35. This, therefore, is the context in which Uganda’s claims that Sudanese forces had been deployed on a massive scale in Congolese territory during the month of August and, with a view to destabilizing Uganda, had shipped in thousands of Ugandan rebels, a Sudanese military aircraft having even attacked the UPDF in Bunia directly, on 26 August 1998<sup>60</sup>. Once again, not only is this account unsupported by any solid evidence; it is even impliedly contradicted by Uganda’s “irrefutable proof”, to which I referred a short time ago, which speaks of denying the Sudan the “opportunity” to use the territory of the Congo.

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<sup>53</sup>CR 2005/7, p. 13, para. 16 (Mr. Brownlie); p. 37, para. 57 (Mr. Reichler).

<sup>54</sup>CMU, Ann. 48.

<sup>55</sup>*Ibid.*, Anns. 31, 42 and 90.

<sup>56</sup>RU, p. 67, para. 155; CR 2005/2, pp. 26-27, paras. 30-31 (Maître Tshibangu Kalala).

<sup>57</sup>CMU, Ann. 27.

<sup>58</sup>CR 2005/6, pp. 38-39, para. 60 (Mr. Reichler); CR 2005/7, pp. 14-15, para. 18 (Mr. Brownlie); CR 2005/7, p. 46, para. 31 (Mr. Mbabazi).

<sup>59</sup>CMU, Ann. 27; emphasis added.

<sup>60</sup>CMU, pp. 40 *et seq.*; CR 2005/6, p. 38, para. 59 (Mr. Reichler).

36. But the scenario does not stop there. Still concerned to render credible the claim of a Sudan-Congo conspiracy, Uganda then asserts that it defeated the Sudanese army at Businga in February 1999, and that the Sudanese forces then retreated as far as Gbadolite<sup>61</sup>. This was the city in which UPDF forces were said to have engaged forces led by a senior Sudanese officer for two months, between May and July 1999<sup>62</sup>. The “battle at Gbadolite” is described as a “major encounter”, giving rise to “fierce fighting”<sup>63</sup>, after which the Sudanese army, finally defeated by the glorious UPDF, left the Congo for good<sup>64</sup>.

37. Mr. President, at this stage I should like to quote again the words of one of Uganda’s counsel about proof of the presence of an army campaigning in the territory of another State. According to that honourable gentleman, if Ugandan soldiers had been present in the western part of the Congo at the beginning of August 1998,

“they surely would have left some telltale sign: dead or wounded Ugandan soldiers; used or spent cartridges or artillery shells; field equipment; mess kits; empty or discarded food tins; or the myriad other detritus of battle”<sup>65</sup>.

All that is required to assess the weakness of this proposition is to transpose it to the account of the Gbadolite campaign. Because Uganda has still been unable to adduce the slightest evidence of the presence of a single Sudanese soldier, alive or dead, captured or not, of a single Sudanese aircraft or of a single Sudanese army tank in the Congo, and this after allegedly joining battle with the Sudan for weeks on end.

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38. The scenario of heroic battles fought by the UPDF against a Sudanese army in the Congo is simply not credible. It is interesting in this connection to read the account of the battle of Gbadolite by one of its principal protagonists, the leader of the Congo Liberation Movement. In a book published in 2001 and cited by both Parties in the present case, 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<sup>66</sup>. In reality the UPDF took Gbadolite by attacking

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<sup>61</sup>CMU, p. 43, para. 54.

<sup>62</sup>*Ibid.*, p. 50, para. 63.

<sup>63</sup>*Ibid.*, p. 50, paras. 63 and 64.

<sup>64</sup>CR 2005/6, p. 54, para. 98 (Mr. Reichler).

<sup>65</sup>*Ibid.*, p. 46, para. 77 (Mr. Reichler).

<sup>66</sup>Jean-Pierre Bemba, “*Le choix de la liberté*”, Gbadolite, ed. Venus, 2001, pp. 41-46.

the Congolese forces that were defending the city. It never fought against the Sudanese army in the Congo.

39. Mr. President, Members of the Court, the Democratic Republic of the Congo fervently hopes that from now on Uganda will proceed otherwise than by mere assertion. It is not enough to repeat that Congo gave its territory over to hostile forces, whether these were Ugandan rebels or the army of the Sudan. It would still be necessary to prove it. Moreover, it would still be necessary, even assuming that evidence could be adduced to prove it, to show that the Democratic Republic of the Congo was not, at the beginning of August 1998, in a situation of self-defence. That brings me to the last part of my oral argument for this morning.

Mr. President, if you think fit, perhaps there could be a short break at this stage.

The PRESIDENT: You may continue, please.

Mr. CORTEN: Thank you, Mr. President.

**B. In law, Uganda has still been unable to show that the Congo was not in a position of self-defence at the beginning of August 1998**

40. It is clear that, if the Democratic Republic of the Congo was in a position of self-defence at the beginning of August 1998, it had the right to retaliate by fighting the Ugandan army. In so far as it is directed at the period beginning at that time, the Ugandan counter-claim must therefore in any event be rejected.

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41. From the very first days of August 1998, the DRC was the victim of an armed attack by Uganda. This attack developed in several phases: involvement in the launch of the armed rebellion on 2 August, participation in the Kitona airborne operation on 4 August, and the capture of several localities in eastern Congo by the UPDF as from 6 August. At this stage I should like to go back over two of these: the Ugandan military offensive in eastern Congo and UPDF participation in the Kitona airborne operation.

### 1. The UPDF did indeed launch its offensive in eastern Congo on 6 August 1998

42. First of all, it is important to show that the UPDF did launch its offensive in eastern Congo on 6 August 1998, so that, as from that date, there can no longer be any doubt that the Democratic Republic of the Congo was in a position of self-defence.

43. In its Counter-Memorial Uganda claimed that new troops were sent into Congolese territory only in mid-September 1998, pursuant to a decision by its army high command on September 11<sup>67</sup>. This position was maintained in the Rejoinder, despite criticism on this point in the Congo Reply. It is expressly affirmed on two occasions in that pleading that “Uganda did not send troops into the DRC in August 1998”<sup>68</sup>. In the words of the Rejoinder, “there was no border crossing by Ugandan troops at Aru or at any other location”<sup>69</sup>. Or again: “Uganda initiated no military action for more than six weeks — until the middle of September”<sup>70</sup>.

44. This is what Uganda’s position was in its written pleadings: no sending of troops, no crossing of the frontier, no military before mid-September 1998.

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45. However, that position is no longer tenable today. In its oral argument the Congo has cited several statements, not only by Ugandan soldiers but also by President Museveni himself, that confirm the Congolese version of the facts: the Ugandan army did indeed enter the Congo right at the beginning of August, not some six weeks later<sup>71</sup>. As a senior Ugandan official stated, in reply to a question on when UPDF forces began to be sent into the Congo, “it was at the beginning of August”<sup>72</sup>. UPDF penetration into the Congo was mainly along the Aru-Watsa line, as you can see on the map projected behind me. This, then, is the context in which the cities of Beni, Bunia, Watsa, and also Kisangani, all of which have populations of several thousand, were captured and then occupied by the Ugandan army, after sometimes bloody fighting against Congolese forces, between 6 August and 1 September 1998.

46. It is doubtless the clarity of the testimony by its own soldiers that has led to Uganda’s change of position in its oral pleadings. Uganda now no longer denies having sent its troops into

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<sup>67</sup>CMU, pp. 41-42, para. 53.

<sup>68</sup>RU, p. 66, para. 152.

<sup>69</sup>*Ibid.*, p. 67, para. 154.

<sup>70</sup>*Ibid.*, p. 26, para. 63.

<sup>71</sup>CR 2005/2, pp. 28-33, paras. 34-48; p. 39, para. 68 (Maître Kalala).

<sup>72</sup>CW/01/02 23/07/01, p. 38.

Congolese territory in the first half of August 1998. According to the new scenario recounted to us by one of Uganda's counsel: "On 13 August, after the battle of Bunia, Uganda modestly reinforced the troops that were there"<sup>73</sup>. And he continues: "On 10 August . . . a Ugandan battalion moved to the border post at Aru, and then on 14 August, the day after the events at Bunia, received orders to redeploy to Watsa."<sup>74</sup> The same counsel adds that this only confirms what Uganda has been saying all along<sup>75</sup>. In reality, as you will have understood, this new scenario completely contradicts the former one, which in fact consisted of a denial of any military action and any frontier crossing in August, "at Aru or at any other location"<sup>76</sup>.

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47. Uganda will doubtless be able to explain why it consistently denied, until a few days ago, that it had sent troops and engaged in battle in the Democratic Republic of the Congo at the beginning of August. Today Uganda admits having sent troops to Congo as early as 13 August and even, by sending a battalion into the locality of Aru, which is certainly in Congo, on 10 August 1998. Thus Uganda can no longer claim that the invasion began after that date.

48. Mr. President, Members of the Court, as I have already pointed out to you, on three occasions counsel for Uganda have cited a document prepared by the UPDF high command which states that the UPDF decided "to maintain" its troops in the Congo<sup>77</sup>. To *maintain* its troops in the Congo, not to send new troops to the Congo on 11 September 1998. This document would thus rather tend to confirm that Ugandan troops had *already* been sent to the Congo. This was pointed out by Congo on the first day of its oral pleadings<sup>78</sup>, but Uganda seems not to have heard. The Democratic Republic of the Congo hopes that this will be a case of "second time lucky", and that our opponents will no longer come to the Bar of the Court to cite this "irrefutable proof" without seeking to answer the objections that I have just made.

49. Mr. President, Members of the Court, Uganda thus now admits having sent additional troops to the Congo on 10 August. At the same time, however, it minimizes the scope of this

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<sup>73</sup>CR 2005/6, pp. 35-36, para. 55 (Mr. Reichler).

<sup>74</sup>*Ibid.*, p. 36, para. 55.

<sup>75</sup>*Ibid.*

<sup>76</sup>"[T]here was no border crossing by Ugandan troops at Aru or at any other location", RU, p. 67, para. 154; see also CR 2005/7, p. 43, para. 24 (Mr. Mbabazi).

<sup>77</sup>CMU, Ann. 27.

<sup>78</sup>CR 2005/2, p. 26-27, para. 30-31 (Maître Kalala).

action by using euphemisms such as “modest reinforcement” or “redeployment” of these troops, or again “securing” of Congolese localities.

36 50. Obviously such language can deceive no one. As the Congo has already pointed out<sup>79</sup>, General Kazini, who led the UPDF operation called “Safe Haven” in the Congo, has stated quite unambiguously that: “It was in the month of August . . . “Safe Haven” started after the capture of Beni, that was on 7 August 1998.”<sup>80</sup> You will find the relevant excerpt in your judges’ folder at tab 11<sup>81</sup>. Hence, according to the officer who led it, the date on which the operation began is not 11 September, nor yet 13 August, nor even 10 August. It is 7 August 1998. And this operation does not merely amount to a “modest reinforcement” or a “redeployment” of troops, or peaceful movements strictly limited to making the frontier secure. Mr. President, Members of the Court, I beg you to excuse Congo for having to repeat it, but during the four days of pleadings available to it Uganda did not think it worth commenting on one of the most important excerpts from the testimony gathered by the Porter Commission. You will find this in your judges’ folder, at tab 17<sup>82</sup>. This is still General Kazini’s testimony. I shall quote it in French this time; perhaps our opponents will take better notice:

«Lead Counsel : pouvez-vous expliquer brièvement à la commission en quoi consistait l’opération Safe Haven» ?

Général Kazini : «Safe Haven». C’était maintenant une opération... L’opération a reçu le nom de code de «Safe Haven» parce qu’il était nécessaire de changer le plan opérationnel. Souvenez-vous, l’ancien plan était d’opérer conjointement, les deux gouvernements, pour combattre les rebelles ougandais le long de la frontière; l’UPDF et les FAC. Mais il y a alors eu une rébellion, et les rebelles congolais prenaient le contrôle de ces zones. *Alors nous avons décidé de lancer une offensive conjointe avec les rebelles, une opération spéciale que nous avons désigné sous le nom de code de Safe Haven.*»

[“Lead Counsel: So you can briefly explain to the commission what “operation Safe Haven” was about.

Brigadier J. Kazini: ‘Safe Haven’. This was now an operation . . . The operation was code-named ‘Safe Haven’ because there was a need to change in the

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<sup>79</sup>*Ibid.*, p. 30, para. 40.

<sup>80</sup>*Ibid.*

<sup>81</sup>Documents submitted by the Democratic Republic of the Congo for the purposes of the oral proceedings, January 2005, document 2, Report of the hearings of the Ugandan Commission of inquiry (Porter Commission) (excerpts) (Judicial Commission of Inquiry into allegations of illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo 2001, Transcript, November 2002).

<sup>82</sup>*Ibid.*

operational plan. Remember, the earliest plan was to jointly — both governments — to jointly deal with the rebels along the border, that was now the UPDF and the FAC. But now there was a mutiny, the 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.*<sup>83]</sup>

General Kazini states that it was on 7 August 1998 that the UPDF launched a joint *offensive* with Congolese rebels. An offensive — and a joint offensive with Congolese rebels, not a “modest reinforcement of troops”, a “redeployment” or a simple “securing” of the frontier. Uganda’s counsel can certainly no longer remain silent about this testimony. They must either attack its credibility, despite the fact that it comes from General Kazini, the commander-in-chief of the operation, or they must once again change their scenario and admit that it was not on 11 September or on 13 or 10 August that their military offensive against Congo began, but on 7 August.

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51. This issue is crucial, Mr. President, Members of the Court. This is yet another confirmation of this date as the start of the invasion of the eastern Congo. You have before you a document produced to the Porter Commission describing the various stages in operation “Safe Haven”. This document gives the dates on which Congolese localities were captured. It is projected behind me, but you can find it in your judges’ folder at tab 40<sup>84</sup>. It becomes apparent on reading this document that the capture of Congolese towns and cities began on 7 August and continued thereafter, in particular with the arrival of the 3rd Ugandan battalion in Kisangani, several hundred kilometres from the Ugandan frontier not along it, on 1 September. No 11 September turning point can be discerned in this document: the captures are all shown as different stages in one and the same operation, operation “Safe Haven”, to repeat the title of this document. This operation was also funded on a monthly basis, with effect from August 1998, not September. Another document, which you will also find in your judges’ folder, at tab 40, clearly confirms this<sup>85</sup>. It is a list of annexes to the Porter Commission report. I draw your attention to numbers 47 and 48 of these, the contents of which are projected behind me. As you will see, the list refers here to two other documents giving pay details for soldiers participating in operation

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<sup>83</sup>CW/01/03 24/07/01, p. 129; emphasis added.

<sup>84</sup>Documents submitted by the Democratic Republic of the Congo for the purposes of the oral proceedings, January 2005, document 7, Porter Commission Exhibits, JK/01/125 (excerpts).

<sup>85</sup>Judicial Commission of Inquiry into allegations of illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo (May 2001-November 2002), Final Report, November 2002, Annex I. Exhibits, pp. 217, 47 and 48.

“Safe Haven”. These documents also contradict the argument of an 11 September turning point, which our opponents stubbornly defend. As you will see, for the year 1998 they refer to a continuous period extending from August to December. Once again, no 11 September turning point.

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52. Mr. President, Members of the Court, before the month of August 1998 some Ugandan soldiers were conducting limited counter-insurgency operations on the Congolese side of the Ruwenzori Mountains. Before that date, however, Ugandan soldiers had never besieged or taken towns or cities in the Democratic Republic of the Congo. It was effectively the capture of Beni, a town with a population of over 10,000, that marked the beginning of the military intervention in the eastern Congo. Let us listen to General Kazini again. The excerpt is in your judges’ folder, at tab 17<sup>86</sup>:

“Justice Beko: You said Beni was captured when?

Brigadier J. Kazini: On 8 August 1998.

Justice Beko: 8 August 1998.

Brigadier J. Kazini: So before that it was not ... “Operation Safe Haven” had not started. It was the normal UPDF operations — counter-insurgency operations in the Ruwenzoris, before that date of 7 August 1998 . . .

Justice Beko: And what happened on the 7 August?

Brigadier J. Kazini: On 7 August that was fighting (when it took place) and our troops occupied Beni.”<sup>87</sup>

If there is a turning point it is not on 11 September, but on 6 or 7 August 1998 in the eastern Congo.

53. UPDF troops thus fought Congolese forces, UPDF troops occupied Congolese towns and cities, UPDF troops penetrated into Congolese territory as from the beginning of August 1998. At that point in time, therefore, the Democratic Republic of the Congo was in a situation of self-defence. After that date, therefore, the accusation of its use of force against Uganda can no

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<sup>86</sup>Documents submitted by the Democratic Republic of the Congo for the purposes of the oral proceedings, January 2005, document 2, Report of the hearings of the Ugandan Commission of Inquiry (Porter Commission) (excerpts) (Judicial Commission of Inquiry into allegations of illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of the Congo 2001, Transcript, November 2002), CW/01/03, 24/07/01, p. 129.

<sup>87</sup>CW/01/03 24/07/01, p. 129.

longer be maintained — a conclusion strengthened by the fact that on 4 August Uganda was already involved in the Kitona operation, in the far west of the Congo.

**39 2. Uganda did indeed participate in the Kitona airborne operation on 4 August 1998**

54. Uganda's participation in the Kitona operation on 4 August 1998 is established by various concordant sources.

55. A few days ago counsel for Uganda disputed this fact<sup>88</sup>, rehearsing all the arguments in the Ugandan Rejoinder<sup>89</sup>. Unfortunately he did not see fit to comment on the specific replies to these criticisms in Congo's Additional Written Observations on the Counter-Claims<sup>90</sup>. Rather than repeating these, I should like to revisit briefly two points.

56. Firstly, as regards direct sources, the Ugandan army's participation in the operation has been confirmed by no less than five separate items of testimony:

- the first is that of a civil airline pilot, who testified to the presence of a UPDF commander in Goma at the time the operation was launched<sup>91</sup>;
- the second is that of another pilot, who was forced to fly a plane involved in the operation, and who positively testified to the presence of Ugandan soldiers on board<sup>92</sup>;
- the third is that of the Kitona base commander, who declares that he saw Ugandan soldiers while on duty at the time of these events<sup>93</sup>;
- the fourth is that of a former Congolese rebel, who also testified to participation by Ugandan soldiers in the operation<sup>94</sup>. This witness also saw a Ugandan tank in Kitona, the same one that was later recovered by the Congolese armed forces, as Congo has already explained<sup>95</sup>;
- the fifth comes from a Ugandan soldier later taken prisoner by the Congolese armed forces<sup>96</sup>.

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<sup>88</sup>CR 2005/6, p. 42, para. 67 (Mr. Reichler); CR 2005/7, p. 44, para. 25 (Mr. Mbabazi).

<sup>89</sup>RU, pp. 54-63, paras. 120-144.

<sup>90</sup>Additional Observations by Congo, pp. 50-64, paras. 1.79-1.97.

<sup>91</sup>RDRC, Ann. 59, testimony of Mr. José Dubier.

<sup>92</sup>*Ibid.*, Ann. 62, testimony of Mr. Viala Mbeang Ilwa.

<sup>93</sup>*Ibid.*, Ann. 61, testimony of Commander Mpele Mpele.

<sup>94</sup>*Ibid.*, Ann. 58, testimony of Mr. Issa Kisaka Kakule.

<sup>95</sup>CR 2005/2, p. 22, para. 15 (Maître Kalala).

<sup>96</sup>RDRC, Ann. 63, testimony of Mr. Salim Byaruhanga.

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57. Mr. President, Members of the Court, Ugandan soldiers were seen in Goma, at the time of takeoff; they were seen in flight, on board the aircraft that were involved in the operation; they were seen in Kitona, on landing. And these five witnesses are positive: contrary to what one of Uganda's counsel — who incidentally has addressed only two of them — seems to be claiming, there is nothing to show that these witnesses could have mistaken Rwandan soldiers or Congolese mutineers for Ugandan soldiers<sup>97</sup>. For such witnesses, whether they be captains of aircraft or professional soldiers, differences in uniforms or equipment are certainly sufficient criteria. So much for the direct sources.

58. Journalistic sources are the second element to which I wish to return; the Congo has invoked these only by way of confirmation, in accordance with international jurisprudence<sup>98</sup>. Contrary to what Uganda claims, these are accounts based on varied sources, Congolese and international, but also Ugandan. It should be recalled in this connection that on 14 September 1998 Paul Ssemogerere, the leader of the Democratic Party, the main Ugandan opposition party, stated that there was “overwhelming evidence” that Ugandan troops had been flown to western Congo and that UPDF soldiers had been killed or taken prisoner in Matadi and Kinshasa<sup>99</sup>. What is more, these statements are not seriously contested in Uganda. All that is required to be convinced is to read the version of the facts given by the newspaper *New Vision*: “Uganda airlifted its battle-hardened 3rd Battalion to Kitona and Matadi”<sup>100</sup>. The wording is clear, and Ugandan participation in the Kitona action is not presented as a scoop or a sensational revelation but rather as an established and undisputed fact. It should be emphasized that *New Vision* is not only the biggest Ugandan daily but also a semi-official newspaper, very close to the Ugandan Government<sup>101</sup>.

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59. Finally the method used by Uganda to cast doubt on the probative value of the items of evidence put forward by the Congo to testify to UPDF participation in the Kitona operation is to dissociate them from each other in order to diminish their scope. In reality there is a convergent

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<sup>97</sup>CR 2005/6, pp. 43-47, paras. 71-78, in particular para. 73 (Mr. Reichler).

<sup>98</sup>RDRC, pp. 82-86, paras. 2.41-2.45.

<sup>99</sup>Press Statement, “Uganda's Involvement in the DRC”, 14 September 1998, RDRC, Ann. 66.

<sup>100</sup>*Ibid.*, Ann. 12.

<sup>101</sup>*Ibid.*, Ann. 1.

body of varied and concordant evidence, demonstrating Uganda's involvement in the Kitona operation on 4 August 1998. If this involvement is combined with operation "Safe Haven", which began at the same time in the east of the country, there can no longer be any doubt that the Democratic Republic of the Congo was then in a situation of self-defence. Even assuming that the Ugandan charges were established in fact — *quod non* —, they must fail in law.

60. Mr. President, Members of the Court, by way of conclusion I will now recapitulate the Congo's answer to Uganda's first counter-claim. This claim relates to three fundamentally distinct periods, which have to be examined separately.

As regards the period of Marshal Mobutu's presidency, Uganda, by allying itself with Laurent-Désiré Kabila's rebel movement and subsequently with his Government, renounced any responsibility claim against the Congo. This part of the claim is inadmissible. In the alternative, this claim is without foundation, because it is not substantiated by any evidence.

As regards the period beginning after President Kabila came to power and ending at the beginning of August 1998 with the launch of Uganda's armed attack, the Ugandan claim is without foundation. There is no evidence to show that any wrongful act was committed by the Congolese authorities, in collaboration either with Ugandan rebels or with the Sudanese governmental authorities.

Lastly, the same conclusion is good for the third period, beginning with the Ugandan attack. During this period the Democratic Republic of the Congo was in a situation of self-defence, which precludes in any event a claim that it had recourse to force against Uganda.

61. Mr. President, Members of the Court, I thank you for your kind attention and ask you, after the break I presume, to give the floor to Professor Salmon, who will take up Congo's argument regarding Uganda's second counter-claim.

**42**

The PRESIDENT: Thank you, Professor Corten.

It is time to have a break of ten minutes, after which the hearings will resume and Professor Salmon will be given the floor.

*The Court adjourned from 11.40 to 11.50 a.m.*

The PRESIDENT: Please be seated. Professor Salmon, you have the floor.

Mr. SALMON: Mr. President, Members of the Court,

### UGANDA'S SECOND COUNTER-CLAIM

It is my job to open the presentation of the response by the Democratic Republic of the Congo to Uganda's second counter-claim.

#### Introduction

1. That claim, as appearing in Uganda's Counter-Memorial, was worded as follows: "the attack on the Ugandan Embassy and the inhumane treatment of Ugandan diplomatic personnel and other Ugandan nationals"<sup>102</sup>. The four paragraphs containing the *claims proper* were found in paragraphs 405 to 408. It is essential for us to reread them in order fully to grasp their true nature, which the DRC is allegedly misrepresenting<sup>103</sup>:

"405. The inhumane treatment and threats to the security and freedom of nationals of Uganda, detailed in paragraphs 397 to 399 above, constitute a series of breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory, which standard forms a part of customary or general international law."

We do indeed read that this concerns "inhumane treatment and threats to the security and freedom of *nationals of Uganda*", constituting "breaches of the international minimum standard relating to the *treatment of foreign nationals*", which forms a part of "customary or general international law".

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"406. The confiscations of privately owned cars and other items of property belonging to Ugandan nationals also constitute breaches of the international minimum standard."

We do indeed read that this concerns "confiscations of . . . *privately owned . . . property* belonging to *Ugandan nationals*", this time constituting "*breaches of the international minimum standard*".

"407. The inhumane treatment described in paragraphs 397 to 399 above also, and in the alternative, constitutes breaches of the standard of general international law based upon universally recognised standards of human rights concerning the security of the human person and the peaceful possession, use and enjoyment of property."

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<sup>102</sup>CMU, p. 224 and explanation, paras. 397-408.

<sup>103</sup>CR 2005/10, p. 37, para. 40 (Mr. Suy).

We do indeed read that the inhumane treatment in question is now said to constitute violations of the recognized standards of *human rights* concerning the security of the *human person* and the peaceful possession, use and enjoyment of *private property*.

“408. In respect of the seizure of the Embassy of the Republic of Uganda, the Official Residence of the Ambassador, and official cars of the mission, these actions constitute an unlawful expropriation of the public property of the Republic of Uganda. The absence of any provision of compensation constitutes an additional element of illegality.”

Once again, the wording speaks volumes. What is in question here is the *seizure* of State property — the Embassy of the Republic of Uganda, the official residence of the Ambassador and official cars of the mission — constituting an “*unlawful expropriation* of the public property of the Republic of Uganda” without compensation.

2. The Court will note that the first three claims relate exclusively to the *treatment of foreign nationals*. In the fourth claim, Uganda alleges the confiscation of public property of Uganda. It would have been possible to invoke the 1961 Vienna Convention on Diplomatic Relations in connection with this last claim. Indeed, the Convention is referred to in a letter quoted in the statement of facts which goes before, but that reference to it is in no way transformed into a formal legal claim. In its claims Uganda did not request the Court to declare that the Convention had been violated. It was careful to refrain from doing so; we will see why shortly. It confines itself to presenting a claim for expropriation of State property without compensation.

44 3. The Court will also have noted in passing that, contrary to what my old friend Eric Suy said the day before yesterday, the DRC is not dwelling “quite erroneously”<sup>104</sup> on “seizure” or “expropriation”. A claim for compensation for this “confiscation” or “unlawful expropriation” was indeed made by Uganda; moreover, Uganda placed a figure of more than \$6 million on it<sup>105</sup>. If Eric Suy feels that we are trying to divert the Court by leading it up the “garden path”<sup>106</sup>, that must be because, as boy scouts, we learned different rules of path-finding.

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<sup>104</sup>CR 2005/10, p. 38, para. 42 (Mr. Suy).

<sup>105</sup>CMU, para. 397 and WOU, p. 17, para. 30 and p. 18, para. 62.

<sup>106</sup>CR 2005/10, p. 38, para. 42 (Mr. Suy).

4. After its second counter-claim was admitted by the Court, the Republic of Uganda reformulated it in the Rejoinder, this time relying on a violation of the 1961 Vienna Convention on Diplomatic Relations.

The Democratic Republic of the Congo accordingly contends:

- (a) first, that the claim (as reformulated in the Rejoinder) is inadmissible to the extent that it is founded on a violation of the Vienna Convention on Diplomatic Relations, for lack of connection with the principal claim (I shall address this point in the first part of my presentation);
- (b) secondly, the claim based on inhumane treatment of Ugandan nationals cannot be admitted either, because the requirements for admissibility of diplomatic protection are not satisfied (I shall address this point in the second part of my presentation);
- (c) thirdly, assuming the claims to be admissible, the claims deriving from this second counter-claim are without merit, as Maître Tshibangu Kalala will later show.

**I. First, the claim is inadmissible to the extent that it is founded on a violation of the Vienna Convention on Diplomatic Relations, for lack of connection with the principal claim**

5. In its Written Observations of June 2001 on the claims presented as counter-claims by Uganda, the DRC maintained that the claims concerning the alleged attacks on Ugandan diplomatic properties and personnel in Kinshasa did not meet the direct connection requirement laid down by Article 80, paragraph 1, of the Rules of Court<sup>107</sup>, which reads as follows: “1. A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.”

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6. Responding to this objection, Uganda asserted that the criteria of connection were satisfied, that “*the facts at issue are of the same nature* of many of the facts upon which the DRC’s claims are based . . .”<sup>108</sup>. And Uganda quoted the DRC to the effect that the DRC “*finds its case on . . . armed aggression . . . together with all of the acts resultant therefrom*”<sup>109</sup>, on “*arbitrary detentions*”, on “*inhuman treatment*”, on “*looting of public and private institutions*”. “It is thus

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<sup>107</sup>WODRC, pp. 47 *et seq.*

<sup>108</sup>WOU, p. 29, para. 57.

<sup>109</sup>*Ibid.*, pp. 29-30, para. 58.

plain”, concluded Uganda, “that many of the DRC’s and Uganda’s complaints are of the same factual nature”<sup>110</sup>.

7. Uganda continued:

“It is likewise unmistakable that the DRC’s claims and Uganda’s counter-claim *form part of the same factual complex* . . . As a direct outgrowth of the hostilities between the two States . . . FAC troops stormed the Ugandan Chancery, then detained and beat Ugandan nationals at the airport, and then broke into the Chancery once more.”<sup>111</sup>

8. Uganda then maintained: “Just as the facts underlying the DRC’s claims and Uganda’s counter-claim are of the same nature, so too are the *legal* claims advanced by each”, for example “human rights violations in defiance of the most basic customary law” or “compensation . . . for all acts of looting and theft”. Similarly, Uganda based its counter-claim in these proceedings on a violation by the Democratic Republic of the Congo of “the standard of general international law based upon universally recognized standards of human rights” and “demand[ed] compensation for the unlawful expropriation of Ugandan property”<sup>112</sup>.

9. Finally, Uganda claimed that the Embassy premises were made available to Ugandan dissident elements and that:

“[t]hus, the Congolese State’s attack upon and seizure of the Ugandan Embassy was directly connected to its support for anti-Uganda insurgent groups carrying out armed attacks against Uganda from Congolese territory. And these State-supported acts of armed aggression against Uganda are . . . directly connected to the subject matter of the DRC’s claim against Uganda.”<sup>113</sup>

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10. In its Order of 29 November 2001, the Court ruled that this counter-claim was “admissible as such and form[ed] part of the current proceedings”, stating the reasons for its decision in the following terms:

“it is evident from the case file that the facts relied on by Uganda occurred in August 1998, immediately after its alleged invasion of Congolese territory; whereas each Party holds the other responsible for various acts of oppression allegedly accompanying *an illegal use of force*: whereas these are facts of the same nature, and whereas the Parties’ claims form part of the same factual complex . . .; and whereas each Party seeks to establish the responsibility of the other by invoking, *in connection with the alleged illegal use of force*, certain rules of conventional or customary

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<sup>110</sup>*Ibid.*, p. 30, para. 60.

<sup>111</sup>*Ibid.*, pp. 30-31, para. 61.

<sup>112</sup>*Ibid.*, p. 31, para. 62.

<sup>113</sup>*Ibid.*, pp. 31-32, para. 63.

international law *relating to the protection of persons and property*; whereas the Parties are thus pursuing the same legal aims;

41. Whereas the Court considers that the second counter-claim submitted by Uganda is therefore directly connected with the subject-matter of the Congo's claims"<sup>114</sup>.

11. This shows that the Court recognized the existence of a connection only insofar as it was based on Uganda's assertion of *the same legal aims* as those underlying the claims of the Congo, in particular "in connection with the alleged illegal use of force [and] *certain rules of conventional or customary international law relating to the protection of persons and property*".

12. Yet, in its Rejoinder, Uganda ascribed new legal bases to the DRC's responsibility for the attack on the Ugandan Embassy and the inhumane treatment of diplomatic personnel of the Ugandan Embassy and other Ugandan nationals. In effect, Uganda made a partial change in its claims, which are now grounded on three separate legal foundations:

- the first (for the first four bases of claim): violation of various articles of the 1961 Vienna Convention on Diplomatic Relations: Articles 22 (inviolability of mission premises)<sup>115</sup>, 29 (inviolability of the person of diplomatic agents)<sup>116</sup>, 30 (inviolability of the private residence of a diplomatic agent)<sup>117</sup> and 24 (inviolability of documents and archives of the mission)<sup>118</sup>;
- 47 — the second: breaches of the international minimum standard relating to the treatment of foreign nationals (for the fifth basis of claim)<sup>119</sup>; and
- the third: the unlawful expropriation of the public property of Uganda (for the sixth basis of claim)<sup>120</sup>.

13. This transformation of the legal underpinning of Uganda's claim, by including therein claims based on violation of the Vienna Convention, broadens the subject-matter of the dispute which the Court has authorized Uganda to present and is accordingly inadmissible.

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<sup>114</sup>Order of 29 November 2001, paras. 40 and 41; emphasis added.

<sup>115</sup>RU, Vol. I, pp. 312-316.

<sup>116</sup>*Ibid.*, pp. 316-320.

<sup>117</sup>*Ibid.*, p. 321.

<sup>118</sup>*Ibid.*, p. 322.

<sup>119</sup>*Ibid.*, pp. 322-331.

<sup>120</sup>*Ibid.*, pp. 331-332.

14. In truth, the Vienna Convention is relied on in an attempt to confer upon certain private individuals the status of those entitled to privileges and immunities; thus, the “nationals” become “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”<sup>121</sup>. Describing them as such, on the basis of unproven facts by the way, is nevertheless to no avail, because the whole problem lies in determining whether Uganda is entitled to invoke the Vienna Convention.

15. Let us recall that the Court based its decision to recognize a direct connection with this latter claim solely on the fact that

“each Party seeks to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of conventional or customary international law *relating to the protection of persons and property*; . . . the Parties are thus pursuing *the same legal aims*”.

16. But, while the DRC cites the violation of the United Nations Charter provisions on the use of force and on non-intervention, as well as The Hague and Geneva Conventions on the protection of persons and property in time of occupation and armed conflict, Uganda suddenly places its reliance on the 1961 Vienna Convention on Diplomatic Relations, which was not invoked by the DRC at all. Uganda thereby breaks the connection which the Court identified in its Order of 29 November 2001. The Vienna Convention was not invoked in either Uganda’s Counter-Memorial or its additional observations because there was no counterpart to it in the **48** DRC’s claims. Thus, raising this point in the Rejoinder is indeed a “ploy”<sup>122</sup> — in Professor Suy’s words — by Uganda.

17. This change by Uganda in its claim has the effect of rendering inadmissible that part of the claim affected by it. As the Permanent Court of International Justice said in the *Société Commerciale de Belgique* case: “it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character”<sup>123</sup>.

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<sup>121</sup>RU, Vol. I, p. 325, para. 703.

<sup>122</sup>CR 2005/10, p. 40, para. 50 (Mr. Suy).

<sup>123</sup>Judgment of 15 June 1939, *P.C.I.J. Series A/B, No. 78*, p. 173.

18. Furthermore, the new foundation which Uganda seeks to ascribe to its claim would call into play Article 63 of the Statute of the Court, concerning the right of third States to intervene in proceedings. To admit Uganda's new claims under the 1961 Vienna Convention would amount to infringing the rights of the other States Parties to that Convention, which were not notified in due course of their right to intervene.

19. In conclusion, the DRC maintains that, for the reasons set out above, those aspects of the Ugandan claim which concern the interpretation and application of the 1961 Vienna Convention on Diplomatic Relations must be dismissed as inadmissible.

**II. Secondly, the claim based on inhumane treatment of Ugandan nationals cannot be admitted either, because the requirements for admissibility of diplomatic protection are not satisfied**

20. The facet of the claim relating to alleged mistreatment suffered by certain Ugandan nationals and founded on the violation of the minimum international standard concerning treatment of foreign nationals is inadmissible.

21. By means of this claim, Uganda is clearly exercising its diplomatic protection on behalf of the alleged victims. Uganda's belated denial is unconvincing. Its first three claims were founded on protection of its nationals, not in terms of protection of State interests. The abrupt transformation of the claim, as we have seen, is unacceptable.

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22. That said, before an application on behalf of nationals can be admitted, it must meet the conditions on admissibility attaching to the exercise of diplomatic protection: first, the nationality of the alleged victims must be proved and, second, the victims must have exhausted their local remedies. Neither of these conditions on admissibility is satisfied in the present case.

23. First, Uganda has not shown that the persons on whose behalf it is claiming to act are of Ugandan nationality and not Rwandan or of any dual nationality. It will be recalled that, by Uganda's own admission<sup>124</sup>, the Embassy also sheltered Rwandan refugees. Further, it is unknown whether these individuals are still alive and whether they still have Ugandan nationality. Only the number of refugees concerned is known; their exact identity, their exact nationality, the nature of the alleged unlawful acts committed against each of them, all these elements are unknown. In a

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<sup>124</sup>CMU, p. 40, para. 51.

word, the very elements of the claim in respect of the identity of the victim and the object and circumstances of the injury are not produced and, nor, therefore, is the legal basis of the claim established.

24. Moreover, these nationals are sometimes described as entitled to treatment under the international standard applicable to foreign nationals and sometimes as individuals entitled to the protection owed to diplomatic personnel. Uganda's strategy here cannot help but bring to mind La Fontaine's bat, who, depending on which dire straits she had got herself into, cried out in one case:

“What! I a mouse! Who told you such a lie?  
Why, ma'am, I am a bird;  
And, if you doubt my word,  
Just see the wings with which I fly.  
Long live the mice that cleave the sky!”

And in another misadventure in which she was at risk of being eaten as a bird:

“I'm truly no such thing as that.  
Your eyesight strange conclusions gathers.  
What makes a bird, I pray? Its feathers.  
I'm cousin of the mice and rats.  
Great Jupiter confound the cats!”

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And La Fontaine concluded:

“And many a human stranger  
Thus turns his coat in danger . . .”

25. Secondly, since it seems that these individuals left the Democratic Republic of the Congo in a group in August 1998 and that is when they allegedly suffered the unspecified, unproven injuries, it would not appear that the requirement of exhaustion of local remedies has been satisfied. Frankly, the Democratic Republic of the Congo has in its possession no information by which to assess the nature of the claim and it is not in a position to indicate what remedies would have been available to the individuals in question. Our opponents' contention as to the absence of such remedies in the DRC is uncalled for and offensive and does not warrant a response.

26. It follows that this umbrella claim by Uganda on behalf of its alleged nationals is inadmissible.

27. I thank the Court for its kind attention. I should be grateful to you, Mr. President, for being so kind as to give the floor to Maître Tshibangu Kalala, who is to conclude the DRC's statements for today by showing, in the alternative, that this second counter-claim by Uganda is, in any event, unfounded.

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

Mr. KALALA: Mr. President, Members of the Court,

#### **UGANDA'S SECOND COUNTER-CLAIM IS UNFOUNDED IN FACT**

1. As Professor Jean Salmon explained to the Court just a moment ago, the aspect of the Ugandan counter-claim relating to the alleged mistreatment of its nationals in August 1998 at Kinshasa by Congolese soldiers is patently inadmissible in law.

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2. It is now my task to show the Court, in the alternative, that this aspect of the Ugandan counter-claim is also unfounded in fact. I shall then explain to the Court that the second aspect of the Ugandan counter-claim relating to the expropriation and seizure by the DRC of Ugandan property situated in Kinshasa also has no credible basis in fact.

#### **I. The DRC did not mistreat the Ugandan nationals living in Kinshasa**

3. Mr. President, Members of the Court, Uganda holds the DRC responsible for the mistreatment of its nationals during the events that occurred in Kinshasa following the outbreak of war on 2 August 1998. In this connection, the Respondent cites three events during which the alleged mistreatment is said to have been committed. These are, first, an alleged attack on the Ugandan Embassy in Kinshasa said to have taken place on or about 11 August 1998; second, incidents said to have occurred at Ndjili International Airport in Kinshasa on 20 August the same year and, third, other incidents supposedly provoked by Congolese soldiers during the evacuation of the Ugandans from Kinshasa in August and September 1998. The DRC will show that none of these accusations made against it by the Respondent has any serious credible factual basis.

**A. The DRC did not mistreat Ugandan nationals on 11 August 1998 during an alleged attack on the Ugandan Embassy in Kinshasa**

4. Concerning the alleged attack on its Embassy in Kinshasa and the mistreatment of its nationals, Uganda asserts in its Counter-Memorial that

“on or around 11 August 1998, FAC troops stormed the Ugandan Chancery. They threatened the Ugandan Ambassador and another diplomat at gunpoint, demanding the release of certain Rwandan nationals. They also stole money found in the Chancery. Despite protests by Ugandan Embassy officials, the Congolese government took no action.”<sup>125</sup>

5. As evidence for this accusation against the DRC, Uganda produces three documents:

- 52** — The first is a letter of protest of 18 December 1998 sent by the Ugandan Minister for Foreign Affairs to the Congolese authorities<sup>126</sup>. This document, written four months after the event, clearly shows that there is no mention of mistreatment of Ugandan nationals on or about 11 August 1998. Only the events of September and November 1998 are referred to. The DRC indicated this in its Reply. But Uganda provided no answer to this either in its Rejoinder or in oral argument.
- The second document is an administrative report prepared by a Ugandan official. This report, drafted on 31 March 2001, in other words 22 days before the filing of the Ugandan Counter-Memorial and over two-and-a-half years after the events recounted in it, was thus prepared unilaterally by the Ugandan authorities for the purposes of the present case<sup>127</sup>. The probative value and credibility of this report thus call for the utmost caution. At any event, what the DRC cannot understand, and Uganda has still not yet explained, is that on 21 August 1998, or only 11 days after the alleged incident, the Ugandan Ambassador to Kinshasa sent a letter of protest to the Congolese authorities, in which he makes no reference to the mistreatment he and another diplomat allegedly suffered on 11 August 1998 at the hands of Congolese soldiers in the Embassy.
- The third document is an affidavit prepared on 20 September 2002 by the Ugandan Ambassador to Kinshasa. In his statements recorded in this document, the former Ugandan Ambassador, Mr. Kamanda Bataringaya, does not even mention the alleged attack by

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<sup>125</sup>CMU, p. 224, para. 398.

<sup>126</sup>*Ibid.*, Ann. 33.

<sup>127</sup>*Ibid.*, Ann. 89 and RDRC, p. 382, para. 6.80.

Congolese soldiers on the Ugandan Embassy said to have occurred “on or around 11 August 1998”, even though he was himself the victim of it.

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The DRC is surprised to note that, for such a serious accusation, Uganda is not even able to give the exact date of the incidents, merely giving an approximation, using the expression “on or around 11 August 1998”. Further, Uganda asserts that, after the incidents concerned, it protested to the Congolese authorities, who did nothing. The DRC formally disputes this assertion and challenges Uganda to furnish proof of this alleged protest.

During his oral argument last Wednesday, Professor Eric Suy stated that “the Congo does not deny the facts”<sup>128</sup> which occurred on or about 11 August 1998. Congo is surprised at this statement, when it has devoted a number of pages of its written pleadings to challenging Uganda’s allegations concerning the alleged incidents on or about 11 August 1998 point by point. In case Uganda has not yet read or understood it, the DRC formally challenges all the Ugandan allegations regarding the incidents concerned as unfounded in fact.

6. The DRC therefore respectfully requests the Court to note that, even applying a particularly loose standard of proof, Uganda’s first accusation against it is totally unfounded in fact.

**B. The DRC did not mistreat Ugandan nationals on 20 August 1998 at Ndjili International Airport in Kinshasa**

7. With respect to the events of 20 August 1998 at Ndjili International Airport in Kinshasa, during which the Ugandan nationals were supposedly mistreated by Congolese soldiers, Uganda bases itself on only two direct sources. The first is a letter of protest of 18 December 1998 sent by the Ugandan Minister for Foreign Affairs to the Congolese authorities, four months after the events. Then there is the affidavit by the former Ugandan Ambassador to Kinshasa. These, Mr. President, are documents prepared unilaterally in Kampala by Uganda itself through the medium of its agents. No other neutral source, a newspaper article for instance, mentions the Ugandan allegations on this point. The DRC therefore respectfully asks the Court not to consider these documents as legal proof.

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<sup>128</sup>CR 2005/10, p. 36, para. 33.

### **C. The DRC did not fail in its duty of protection towards the Ugandan nationals**

54 8. As regards the accusation relating to failure to comply with the duty of protection and prevention, Uganda accuses the DRC of not having fulfilled this duty by refusing to reply rapidly and effectively to the requests supposedly made to it at the time by the Ugandan Ambassador in Kinshasa.

9. In its Reply, the DRC gave a fitting response to this criticism, to which I would ask the Court to refer. So I shall not revert to it here. I would merely say to the Court that Uganda recognizes in its written pleadings<sup>129</sup> that the DRC commissioned one of its officials — who escorted the Ugandan nationals to Ndjili Airport — to ensure their peaceful evacuation to Brazzaville in the Republic of the Congo.

10. It is clear that the Congolese authorities offered protection to the Ugandan nationals within the means available at the time, when the DRC was struggling to repel an armed attack led by Ugandan troops among others. Uganda's accusation is thus groundless.

11. Mr. President, Members of the Court, I have just reached the end of the first part of my presentation, in which I have explained why the first part of Uganda's second counter-claim relating to the alleged mistreatment of its nationals in Kinshasa is totally without foundation in fact. I shall now move on to the second part, in which I shall show the Court that the second part of the second Ugandan counter-claim relating to the seizure and expropriation by the DRC of Ugandan public property situated in Kinshasa is also totally without foundation in fact.

### **II. The DRC did not expropriate Ugandan public property in Kinshasa in August 1998**

55 12. In its written pleadings, Uganda accuses the DRC of having appropriated public and private Ugandan property in Kinshasa in August 1998. This claim concerns first the premises of the diplomatic mission; second, four official vehicles belonging to that mission; third, the official archives of the diplomatic mission; and fourth, various Ugandan movable property. The counter-claimant valued its looted property at \$US 6,139,060<sup>130</sup>. I shall show the Court that both the Ugandan accusations are groundless and also that Uganda's valuation of the property concerned is unrealistic.

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<sup>129</sup>CMU, p. 224, para. 399.

<sup>130</sup>*Ibid.*, p. 224, para. 397.

### **A. The DRC did not misappropriate Ugandan public property**

13. In its Counter-Memorial, Uganda accused the DRC — as Professor Jean Salmon pointed out a moment ago — of “seizure of the Embassy of the Republic of Uganda [and of] the Official Residence of the Ambassador”<sup>131</sup>. For Uganda, these seizures constituted an “unlawful expropriation of the public property of the Republic of Uganda”<sup>132</sup>. In its Reply, the DRC answered that, in fact, this property had been abandoned by the Ugandan diplomatic authorities voluntarily, in August and September 1998, and that it had since then always remained at the disposal of those authorities.

14. During his oral argument, Professor Suy stated that “Uganda has never claimed that there was any seizure or expropriation of its property . . .” and it added that “The Congo seeks to divert the Court from the real issue.”<sup>133</sup> This assertion, Mr. President, is totally and directly contradicted by paragraph 408 of the Ugandan Counter-Memorial, which does indeed refer to “seizure and appropriation” of the Embassy and Ambassador’s residence. The DRC takes note of this retraction by Uganda and asks the Court to do likewise. May I inform the Court that, as I speak, the two properties concerned have been at the disposal of Ugandan diplomats since their return to Kinshasa in 2004. If those officials have not yet occupied these buildings and are renting elsewhere, as Professor Suy indicated in his oral argument last Wednesday<sup>134</sup>, it is only in order to have some essential maintenance work done and to purchase certain fittings, the properties having stood empty for over five years. The DRC therefore considers that there is no longer any dispute between the two countries regarding these properties and that Uganda will finally have the courage solemnly to withdraw in open court its claim on this head.

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In its written pleadings, as in its oral argument, Uganda accuses the DRC of having housed a Ugandan dissident, Mr. Taban Amin, in the official residence of its Ambassador in Kinshasa and appointed him general in the Congolese army<sup>135</sup>. The Congo strongly contests this assertion, which has no credible basis, being based merely on hearsay. What the DRC does know, which is also

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<sup>131</sup>*Ibid.*, p. 228, para. 408.

<sup>132</sup>*Ibid.*

<sup>133</sup>CR 2005/10, p. 38, para. 42.

<sup>134</sup>*Ibid.*, p. 36, para. 36.

<sup>135</sup>*Ibid.*, CR 2005/10, p. 36, para. 35.

common knowledge, is that Taban Amin was recently received by the Ugandan authorities in Kampala, who gave him a very warm welcome, with major international media coverage.

**B. The DRC did not misappropriate the vehicles of the Ugandan diplomatic mission in Kinshasa**

15. Mr. President, Members of the Court, in its Counter-Memorial as in its oral argument, Uganda asserts that Congolese soldiers forced their way into the Embassy and into the official residence of its Ambassador in Kinshasa, in September 1998, and that they seized four official Embassy cars<sup>136</sup>. In its Reply, the DRC stressed the absence of evidence to back up these allegations and also their strong lack of credibility<sup>137</sup>. In this connection, the DRC points out that, in support of these two allegations, Uganda produces two documents which I have already subjected to critical analysis in the course of this presentation. These are the letter of protest of 18 December 1998, which was unsupported by any evidence, and the evacuation report unilaterally prepared on 31 March 2001 by a Ugandan official. Incidentally, this report makes no reference to any theft of Ugandan vehicles said to have occurred in September 1998.

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16. As I have already explained in the course of this presentation, we are dealing here, Mr. President, with two documents unilaterally prepared by Uganda, and uncorroborated by any other source. The DRC would moreover emphasize that Uganda failed to take the elementary precaution of preparing an inventory of its movable property jointly with the Congolese authorities, as is customary, before entrusting surveillance and protection of its premises to the DRC<sup>138</sup>. This would have had the merit of making it possible to indicate precisely that a particular item had been removed or damaged when compared with the original inventory drawn up in September 1998. Since the number and nature of the items supposedly left behind by Uganda in these buildings was not established *in tempore non suspecto*, there is thus no credible basis for proving that Uganda left four cars in Kinshasa and that they were stolen by Congolese soldiers.

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<sup>136</sup>UCM, p. 225, para. 400.

<sup>137</sup>See CR, vol. 1, pp. 391-392, paras. 6.96-6.99.

<sup>138</sup>*Ibid.*, p. 394, para. 6.105.

**C. The DRC did not misappropriate the archives of the Ugandan diplomatic mission in Kinshasa**

17. In its Rejoinder<sup>139</sup>, Uganda also accuses the DRC of having misappropriated certain archives, as well as official documents belonging to its diplomatic mission in Kinshasa.

18. Mr. President, Members of the Court, in order to prove the appropriation of its archives by the Congolese authorities, the Counter-Claimant produces two documents, first an affidavit recording the testimony of the former Ugandan Ambassador to Kinshasa and second, the status report of 28 September 2002, which states that no movable property belonging to the Ugandan diplomats was found on the premises.

19. As regards the affidavit by the former Ugandan Ambassador to Kinshasa, I have already explained to the Court a few moments ago why this document can have no probative value in law. I shall therefore not revert to this again.

20. As to the inventory of 28 September 2002, it can only constitute evidence if compared with a separate inventory, prepared *in tempore non suspecto* at the time when the Ugandan diplomats were evacuated from Kinshasa. However, no such inventory was ever made, probably because the members of Uganda's diplomatic mission took with them all property and archives of any value, and were not concerned about other papers of no value, which they would have left at the Embassy.

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21. As part of its pleading strategy aimed at establishing the Congo's responsibility for the alleged loss of its official archives, Uganda also produces a list in this connection<sup>140</sup>, entitled "loss of Uganda Government property at Uganda Embassy"; this list, too, was prepared unilaterally by Ugandan officials in their Kampala offices for purposes of the present proceedings and appended to Uganda's Counter-Memorial<sup>141</sup>. The DRC has already mounted a vigorous and decisive challenge to this document in its Reply<sup>142</sup>, to which Uganda has failed to respond. I will therefore not repeat our criticisms here.

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<sup>139</sup>RU, p. 322, para. 695.

<sup>140</sup>*Ibid.*, p. 315, para. 680.

<sup>141</sup>CMU, Ann. 92.

<sup>142</sup>RC, pp.394-395, paras.6.104-6.105.

22. As a final point in my refutation of Uganda's claim regarding the loss of its official archives, I would draw the Court's attention to our opponents' curious conduct in this matter.

First, it is disturbing, Mr. President, Members of the Court, to note that Uganda raised, for the first time, the issue of the theft or loss of its official archives only in its Rejoinder of 6 December 2002, four years after the event. Thus there is no mention of the matter either in Uganda's diplomatic protests in August and December 1998, or in its counter-claims in these proceedings — not in its Counter-Memorial, not in its Observations on its counter-claims, nor in its oral argument in the provisional measures proceedings. The DRC therefore fails to understand how the Ugandan former ambassador to Kinshasa, who claims to have himself actively participated in the preparation of Uganda's Counter-Memorial<sup>143</sup>, can have suffered for over four years from total amnesia regarding the seizure by the Congolese authorities of important official documents belonging to his country.

Secondly, and this is fundamental, Mr. President, while suddenly producing a claim that Congolese troops prevented its diplomats from removing the archives and other official mission documents at the time of their departure from Kinshasa, Uganda fails to explain how it has nonetheless come to be in possession of certain official documents prepared and dated in Kinshasa which purport to come from those archives. This is *inter alia* the case in respect of:

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- a report prepared in April 1998 by Uganda's ambassador in Kinshasa on the insurgency in the Ruwenzori Mountains<sup>144</sup>;
- Uganda's letter of protest of 21 August 1998<sup>145</sup>;
- the Embarkation Permit issued on 19 August 1998 by the Congolese Government to the individuals whose evacuation had been requested by the Ugandan Embassy<sup>146</sup>;
- the list of 32 Ugandan nationals drawn up by the Ugandan Embassy in Kinshasa<sup>147</sup>;
- the letter of 22 August 1998 whereby Uganda's ambassador in Kinshasa requested the Congolese authorities to add two names to that list<sup>148</sup>; and

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<sup>143</sup>See above, para. 1.35.

<sup>144</sup>RU, Ann. 22.

<sup>145</sup>CMU, Ann. 23.

<sup>146</sup>RU, Ann. 28A.

<sup>147</sup>*Ibid.*

— the letter of 24 August 1998 addressed by Uganda’s ambassador in Kinshasa to the Congolese Government<sup>149</sup>.

Mr. President, Members of the Court, as the Court can readily see, all the official documents which I have just cited — and there are already many of them — were prepared in Kinshasa and kept by the Ugandan Embassy in its archives. If Uganda’s diplomats had been unable to remove official documents when they left Kinshasa, because they were allegedly prevented from doing so by Congolese troops, how, then, was Uganda able to obtain the documents which I have just cited and add them to the case file?

23. In the absence of any answer by Uganda to this fundamental question, and in light of the particularly fanciful nature of this aspect of Uganda’s claim, the DRC can only request the Court to dismiss it as manifestly unfounded.

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**D. The DRC did not seize certain moveable property of the Ugandan diplomatic mission in Kinshasa**

24. Finally, in its Rejoinder Uganda contends that the DRC seized certain moveable property from the Ugandan diplomatic mission in Kinshasa. As evidence of these allegations, the counter-claimant presents a list prepared unilaterally by its own officials — which I have already cited in this presentation<sup>150</sup> — together with the inventory of 28 September 2002, which states that no moveable property belonging to the mission was found on the premises<sup>151</sup>. I have already challenged the evidentiary value of these two documents in this presentation. I would merely now recall that, in law, these two documents carry no probative force whatever in regard to Uganda’s claims.

Mr. President, the DRC still fails to understand Uganda’s pleading strategy, which leads it to produce to the Court documents concocted by itself with a view to engaging the international responsibility of another State. Uganda has been unable to prove either that its nationals suffered inhumane treatment, or that its property was expropriated or stolen.

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<sup>148</sup>*Ibid.*

<sup>149</sup>*Ibid.*, Ann. 29.

<sup>150</sup>See above, para. 2.51.

<sup>151</sup>RU, p. 315, para. 680.

25. I now turn to the final section of my presentation, which concerns the evaluation of the alleged loss suffered by the Ugandan State as a result of acts perpetrated by Congolese troops.

26. Mr. President, Members of the Court, I note that, according to Uganda, the total value of its public property allegedly expropriated or stolen by the DRC amounts to US\$6,319,060. This calculation was made unilaterally by Uganda's own officials and is claimed to represent a reference value for purposes of reparation of the material loss allegedly suffered by Uganda<sup>152</sup>.

61 27. In its written pleadings the DRC has already explained why the counter-claimant's method of calculation was profoundly flawed<sup>153</sup>. Uganda has failed to answer the DRC's objections on this point. In these circumstances, the DRC can but restate the arguments set out in its written pleadings. Without going into detail, the DRC would note that it is difficult, to say the least, to understand on what basis it is being asked to pay a sum covering the total value of Uganda's two buildings when these are currently in Uganda's possession and, as Professor Suy has told us, were never seized or expropriated by the DRC.

28. In conclusion, the DRC feels bound to stress the very peculiar evidentiary techniques employed by Uganda in order to substantiate its charges against the Congo. It is easy enough to accuse a sovereign State of maltreatment of individuals and thefts of archives, money and other property. But it is quite another matter to substantiate accusations of this kind through evidence going beyond a curious montage of self-concocted documents, the reading of which demonstrates their total lack of relevance, since they simply make no mention whatever of the incidents in question.

29. In conclusion, the DRC respectfully requests the Court, even if it does find Uganda's second counter-claim admissible, purely and simply to dismiss that claim as unfounded, both in fact and in law. Mr. President, Members of the Court, this brings to an end the presentation of the Democratic Republic of the Congo on Uganda's counter-claim. Mr. President, I thank the Court for its kind attention and wish it a pleasant weekend.

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<sup>152</sup>CMU, p. 224, para. 397 and RU, p. 331, para. 714.

<sup>153</sup>RDRC, pp. 394-395, para. 6.105, and AWODRC, pp. 101-102, paras. 2.62-2.63.

Le PRESIDENT : Merci beaucoup, Monsieur Kalala. Je donnerai maintenant la parole au juge Vereschchetin, qui a une question à poser à chacune des Parties, puis aux juge Kooijmans et au juge Elaraby, qui auront chacun une question commune aux deux Parties. Monsieur Vereschchetin, je vous en prie.

Le juge VERESCHCHETIN : Merci, Monsieur le président. Ma première question s'adresse à la République démocratique du Congo. Quelles sont les périodes précises auxquelles se réfèrent les conclusions telles qu'elles figurent dans les pièces de procédure de la République démocratique du Congo ?

Voici à présent la question adressée à la République de l'Ouganda. Quelles sont les périodes précises auxquelles se réfèrent les conclusions relatives à la première demande reconventionnelle telles qu'elles figurent dans les pièces de procédure de l'Ouganda ? Merci, Monsieur le président.

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Le PRESIDENT : Merci, Monsieur Vereschchetin. Je donnerai à présent la parole au juge Kooijmans.

Juge KOOIJMANS : Merci, Monsieur le président. Ainsi que vous l'avez indiqué, cette question s'adresse à l'une et l'autre Partie. Les Parties peuvent-elles indiquer quelles zones des provinces de l'Equateur, Orientale, du Nord-Kivu et du Sud-Kivu se trouvaient, au cours des périodes pertinentes, sous le contrôle, respectivement, des UPDF et des diverses milices rebelles ?

Il serait souhaitable que la réponse à la présente question soit accompagnée de croquis. Merci, Monsieur le président.

Le PRESIDENT : Merci, Monsieur Kooijmans. Je donnerai maintenant la parole au juge Elaraby.

Juge ELARABY : Merci, Monsieur le président. Ma question s'adresse aux deux Parties.

L'accord de Lusaka, signé le 10 juillet 1999 et entré en vigueur vingt-quatre heures après sa signature, dispose que : «Le retrait définitif de toutes les forces étrangères du territoire national de la République démocratique du Congo se fera conformément à l'annexe B du présent accord.»

(Annexe A, chap. 4 (4.1).)

L'alinéa 17 de l'annexe B dispose que le «retrait ordonné des forces étrangères» devra prendre place au jour «J + 180 jours».

L'Ouganda affirme que le retrait définitif de ses forces est intervenu le 2 juin 2003.

Quelles sont les vues des Parties concernant la base juridique de la présence de forces ougandaises en République démocratique du Congo durant la période comprise entre le «retrait ordonné définitif» convenu dans l'accord de Lusaka et le 2 juin 2003 ? Merci, Monsieur le président.

Le PRESIDENT : Merci, Monsieur Elaraby.

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Le texte écrit de ces questions sera communiqué aux Parties dès que possible. Les Parties peuvent décider, si elles le jugent opportun, de répondre à ces questions lors du deuxième tour de la procédure orale. Il leur est également possible de présenter des réponses écrites aux questions dans un délai d'une semaine suivant la clôture de la présente procédure orale, à savoir pour le vendredi 6 mai 2005 au plus tard. Dans ce dernier cas, toutes observations qu'une Partie souhaiterait faire, conformément à l'article 72 du Règlement de la Cour, sur les réponses fournies par la Partie adverse devraient être présentées le vendredi 13 mai au plus tard.

Voici qui met un terme à la séance d'aujourd'hui. Je tiens à remercier chacune des Parties pour les exposés qu'elles ont présentés au cours de ce premier tour de plaidoiries. Les audiences reprendront le lundi 25 avril, de 10 heures à 13 heures, puis de 15 heures à 16 h 30 pour entendre le second tour de plaidoiries de la République démocratique du Congo concernant ses propres demandes. A l'issue de l'audience du lundi après-midi, le Congo présentera ses conclusions finales concernant ses propres demandes.

L'Ouganda, quant à lui, présentera sa réplique orale, tant sur les demandes reconventionnelles de la République démocratique du Congo que sur ses propres demandes, le mercredi 27 avril de 10 heures à 13 heures, puis de 15 heures à 18 heures. A l'issue de l'audience du mercredi après-midi, l'Ouganda présentera ses conclusions finales, tant sur les demandes du Congo que sur ses propres demandes reconventionnelles.

La République démocratique du Congo conclura ensuite le vendredi 29 avril, de 10 heures à 11 h 30, son second tour de plaidoiries concernant les demandes reconventionnelles de l'Ouganda et présentera ses conclusions finales à cet égard.

Chaque Partie disposera donc d'un total de deux séances complètes de trois heures pour l'ensemble de ses répliques orales. Je tiens néanmoins à vous rappeler que, conformément au paragraphe 1 de l'article 60 du Règlement de la Cour, les exposés oraux doivent être aussi succincts que possible. J'ajouterai que le but du second tour de plaidoiries est de permettre à l'une et l'autre des Parties de répondre aux arguments présentés oralement par la Partie adverse. Le second tour ne doit dès lors pas constituer une répétition de ce qui a été dit auparavant. Il va donc sans dire que les Parties ne sont pas obligées d'utiliser la totalité du temps de parole qui leur est attribué. Je vous remercie.

La séance est levée.

*L'audience est levée à 13 h 10.*

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