

DISSENTING OPINION OF JUDGE *AD HOC* KATEKA

Disagreement with the Judgment on its key findings — Treatment of evidence not even-handed — Decision on Respondent's defences of consent and self-defence mistaken — Kisangani events — Serious accusations of violations of human rights and international humanitarian law need higher standard of proof — Reliance on United Nations reports concerning alleged exploitation of DRC's natural resources — Ruling on violation of provisional measures unnecessary — Unjustified treatment of Uganda's counter-claims.

1. I find myself in disagreement with the Court's Judgment on key aspects on the use of force, violations of human rights and international humanitarian law and the alleged unlawful exploitation of the DRC's natural resources. With regret, I am therefore constrained to vote against several of the operative clauses of the *dispositif*. Before explaining my reasons for disagreeing with parts of the Judgment, I wish to comment on some evidentiary issues and on the background to the case.

I. EVIDENTIARY ISSUES AND BACKGROUND TO THE CASE

2. The Court enjoys freedom and flexibility with regard to the consideration of evidence. In this case, as the Court acknowledges, both Parties have presented it with a vast amount of evidentiary materials. It has therefore to assess the probative value of the documents and eliminate from further consideration those it deems unreliable. This is not an easy task, as it calls for choice. In this exercise of choice, a judge is guided by an "inner conviction" (inevitably influenced by one's background and experience), which should prick the conscience so that one lives up to the requirement of Article 20 of the Court's Statute. As judge *ad hoc*, I am mindful of the words of Judge Lauterpacht that I am bound to exercise my function impartially and conscientiously while also discharging the special obligation to endeavour to ensure, so far as is reasonable, that argument in favour of the Party that appointed me "is reflected — though not necessarily accepted — in [this] dissenting opinion" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 409, para. 6).

3. In my view, the Court has not been even-handed in its treatment of

the materials submitted by the two Parties. For example, the Court terms as “a bundle of news reports of variable reliability” (Judgment, para. 136), which the Court does not find weighty and convincing. This is evidence adduced by Uganda to establish the Sudan’s involvement in aiding anti-Ugandan elements in the DRC. This is a whole set of over 140 documents, which is published in Volume IV of the DRC’s Reply. Earlier, in paragraph 68 of the Judgment, the Court regards as “an interested source” and rejects evidence proffered by the DRC from the same volume in the context of the Kitona airborne operation. This being the case, one would expect the Court to regard it as a case of “statement against interest” and treat favourably the documents from the same volume that Uganda relies upon.

4. The volume in question is a collection by the Integrated Regional Information Network (IRIN). The sources for the information include United Nations agencies, NGOs and other international organizations and media reports. One would have expected this Office for the Coordination of Humanitarian Affairs (OCHA) affiliated network to be given more credence than it gets, especially when the press information is “wholly consistent and concordant as to the main facts and circumstances of the case” (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 10, para. 13).

But the Court excludes this large amount of materials noting that it lacks corroboration. This is in spite of the fact that the information about the Sudan, that is in this volume, is from different media from all over the world.

5. A further illustration of the unequal treatment of the Parties is depicted when the Court cites an ICG report of August 1998 that the Court acknowledges as “independent”. The report, according to the Court, does seem to suggest some Sudanese support for the ADF’s activities (ADF is a virulent anti-Ugandan rebel group). The Court goes on to quote the report: “It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border.” (Judgment, para. 135.) This theme of the DRC’s inability recurs throughout the Judgment. The Court does not examine this report any further to see if the DRC can be held responsible for the unlawful use of force against Uganda. But the Court holds Uganda internationally responsible for unlawful exploitation of the DRC’s resources in spite of the Court’s finding that it was not governmental policy of Uganda to do so (Judgment, paras. 242 and 250).

6. The Court continues with its tendency to discount evidence in favour of Uganda when it dismisses a key report as of no relevance to Uganda’s case. This is in connection with Uganda’s contention of incorporation into Kabila’s army of thousands of ex-FAR and Interahamwe

génocidaires in May 1998. A United States Department report, which is also set aside by the Court, condemned the DRC's recruitment and training of former perpetrators of the Rwandan genocide. By declaring the report as irrelevant, the Court seems to be unaware of the fourth objective of Uganda's High Command document that states: "To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so." (Judgment, para. 109.)

7. In short, "the Court has chosen to depreciate [Uganda's evidence], to omit any consequential statement of the law", to paraphrase Judge Schwebel's words in his dissenting opinion in the *Nicaragua* case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 272, para. 16). To this end, more examples can be quoted to illustrate how the Court has dealt unevenly with the Parties. The Court, in one part of the Judgment (para. 132), is satisfied that the evidence does show a series of attacks occurring within the relevant time frame against Uganda. However, the Court observes that these facts are not denied by the DRC, but its position is that the ADF alone was responsible for the events.

8. At the start of its substantive consideration of the Parties' contentions, the Court expresses its awareness of the complex and tragic situation which has long prevailed in the Great Lakes region. The Court notes, however, that its task is to respond, on the basis of international law, to the particular legal dispute brought before it. The Court concludes, "[a]s it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that" (Judgment, para. 26).

9. However, the task of the Court cannot be in a vacuum. The existing realities must be taken into consideration. In this particular case, the realities include the genocide that happened in Rwanda in 1994. The effects of this genocide still reverberate in the region to this day. One of the root causes of this crisis has been ethnicity, which was exploited by the colonialists during colonial times. An additional factor is the terrible history of unscrupulous dictators — all of whom had support from abroad. In the case of the DRC, it has led to the land of Patrice Lumumba not to experience peace for most of the time since independence. It is only now that there is hope for such peace.

II. THE USE OF FORCE

10. I voted against the first paragraph of the *dispositif*, which finds that Uganda has violated the principle of non-use of force in international relations, by engaging in military activities against the DRC, by

occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC.

11. This omnibus clause creates confusion by mixing up *jus ad bellum* with *jus in bello*. A finding on Uganda engaging in military activities against the DRC should have been separated from that of occupation. I am of the opinion that the finding on occupation has been invoked by the Court to justify its findings of violations of human rights and international humanitarian law.

12. In this regard, it bears recalling that the first of the DRC's final submissions requests the Court to adjudge and declare:

“1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo . . . has violated . . . the principle of non-use of force in international relations, including the prohibition of aggression . . .”¹ (Judgment, para. 25.)

The Court has not found Uganda responsible for aggression against the DRC. It has reached a finding short of aggression by using the language of “extending military, logistic, economic and financial support to irregular forces . . .” (para. 1 of the *dispositif*). This phraseology evokes the memory of the dictum in the case of *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (*Merits, Judgment, I.C.J. Reports 1986*, p. 14). The dictum left open the definition of “armed attack” as applied in the Charter of the United Nations and under customary international law.

13. In this regard, it has been stated thus “that actions by irregulars can constitute an armed attack” is not challenged, and

“the controversy centres on the degree of state involvement that is necessary to make the actions attributable to the state and to justify action in self-defence in particular cases” (Christine Gray, *International Law and the Use of Force*, 2000, p. 97).

Given the controversy that still persists, I am of the view that the Court should have taken the opportunity to clarify the question of the use of force in self-defence. This is more so in view of the fact that irregular forces lie at the heart of the dispute between the Parties in this case.

14. Following the *Nicaragua* Judgment, the Court was criticized for stating in its dictum that the provision of weapons and logistical support to private groups did not amount to an armed attack. The gist of the

¹ “Aggression is the use of armed force by a State, against the sovereignty, territorial integrity or political independence of another State.” (General Assembly resolution 3314 (XXIX), Art. 1.)

Court's language in the present case has the same effect as that in the *Nicaragua Judgment (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14). In this respect, some publicists contend that the use of force below the threshold of an "armed attack" is covered by the general principle of non-intervention (B. Simma (ed.), *The Charter of the United Nations — A Commentary*, 2nd ed., 2002).

15. In the context of irregulars, others such as Sir Robert Jennings hold the view that the provision of arms and logistical support amount to armed attack. "Accordingly, it seems to me that to say that the provision of arms, coupled with 'logistical or other support' is not armed attack is going much too far." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 543; dissenting opinion of Judge Sir Robert Jennings.) This is the meaning I put to the words of the Court in the first paragraph of the *dispositif*. However, I apply them — see below — to the deeds of the DRC in support of anti-Uganda insurgents.

16. In its analysis of the question of the use of force, the Court has not put much weight to Uganda's two arguments for circumstances precluding wrongfulness, namely, consent and self-defence. As a result of this, the Court has arrived, in my view, at a mistaken conclusion that Uganda has violated the principle of non-use of force by engaging in military activities against the DRC. An examination of Uganda's arguments below reveals the contrary.

17. Uganda contends that its armed forces were present in the DRC from May 1997 to August 1998 and from July 1999 to June 2003 with the consent of the DRC, pursuant to oral agreements with President Laurent-Désiré Kabila in May and December 1997, the bilateral Protocol of April 1998, the multilateral Lusaka Agreement of July 1999 and the bilateral Luanda Agreement of September 2002. For the period not covered by the DRC's consent, i.e., from mid-September 1998 to mid-July 1999, Uganda contends that its military forces in the Congo during this ten-month period were there pursuant to the lawful exercise of the right to self-defence.

18. Concerning the defence of consent, I find myself in disagreement with the Court's conclusion that the consent of the DRC was withdrawn at the Victoria Summit of 8 August 1998. The Court, in my view, has chosen the date of 8 August rather arbitrarily. For there could be several other dates such as (a) 2 August 1998 when the DRC claims that Uganda invaded it, beginning with a major operation at Kitona. But the Court has rightly concluded that it has not been established that Uganda participated in the attack at Kitona; (b) the date of 28 July 1998, when President Kabila issued a statement terminating the Rwandan military presence, "with effect from this Monday, 27 July 1998". However, the Court has found that the presence of the Ugandan forces in the DRC

did not become unlawful by virtue of President Kabila's statement; (c) 13 August 1998 when the United Nations Permanent Representative of the DRC told a press conference that Uganda had invaded the DRC; (d) 11 September 1998 when Uganda invoked the right of self-defence, following the publication of its High Command document, which was implemented by operation "Safe Haven".

19. From the above dates, a reasonable inference can be drawn that the statements attributed to the various leaders of the DRC merely expressed complaints concerning the situation in the DRC. They were not meant to withdraw the consent for the continued presence of Uganda's military forces in the Congo. In this regard, it bears stressing that Uganda took the initiative leading to the Victoria Falls Summits I and II of August and September 1998, respectively. A communiqué addressed to the security concerns of the DRC and those of its neighbours was issued.

20. Regrettably, as an indication of the persistent uneven treatment of the Parties, the Court has not given a correct interpretation to the Lusaka Ceasefire Agreement of 10 July 1999. For example, there is the Court's misleading argument that the arrangements made at Lusaka addressed certain "realities on the ground" and represented "an agreed *modus operandi*" without the DRC consenting to the presence of Ugandan troops (Judgment, para. 99). This argument would seem to suggest that the parties to the Lusaka Agreement were merely dealing with a *de facto* situation of disarming rebels and withdrawing of foreign troops. However, as the Court acknowledges, the Agreement shows that it was more than a ceasefire agreement (Judgment, para. 97). It addresses the key aspect of the conflict by the parties to the Lusaka Agreement, recognizing that the root cause of the conflict was the use of Congolese territory by armed bands, seeking to destabilize or overthrow neighbouring Governments.

21. In order to address the root cause of the conflict, Chapter 12 of Annex A provides that the Parties agreed

"(a) Not to arm, train, harbour on its territory, or render any form of support to subversive elements or armed opposition movements for the purpose of destabilising the others;

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 (d) To address the problem of armed groups in the Democratic Republic of Congo in accordance with the terms of the [Lusaka] Agreement." (Counter-Memorial of Uganda (CMU), Vol. II, Ann. 45, Ann. A, Chap. 12.)

Even the Secretary-General of the United Nations recognized the

problem of armed groups as particularly difficult and sensitive when he stated in a report that “[i]t lies at the core of the conflict in the subregion and undermines the security of all the States concerned” (CMU, Vol. III, Ann. 46, para. 21).

22. Thus, while agreeing with the Court that the Lusaka Agreement did not have a retrospective effect, I do not share the Court’s view that the calendar for withdrawal (of foreign forces) and its relationship to the series of major events did not constitute consent by the Congo to the presence of Ugandan forces for at least 180 days from 10 July 1999 and beyond that time if the envisaged necessary major events did not occur. As counsel for Uganda argued during the oral pleadings, there is a linkage between the disarmament of the armed groups and the subsequent withdrawal of armed forces of foreign States from the DRC. This is borne out by paragraph 12 of Annex B to the Ceasefire Agreement, where the timetable shows that the withdrawal of foreign forces would not occur until after a successful conclusion of the Congolese national dialogue (D-Day² + 90 days), the disarmament of armed groups (D-Day + 120 days) and the orderly withdrawal of all foreign forces (D-Day + 180 days) (CMU, Vol. II, Ann. 45, Ann. B). Indeed there was a delay in the implementation of the Agreement because the inter-Congolese dialogue did not start as envisaged in the timetable.

23. The Court, having reached a wrong interpretation, in my view, of the Lusaka Agreement, proceeds to state that the Luanda Agreement of September 2002, a bilateral agreement between the DRC and Uganda, alters the terms of the multilateral Lusaka Agreement. I am of the view that the other parties to the Lusaka Agreement (i.e., Angola, Namibia, Rwanda and Zimbabwe) would have objected if the bilateral alteration caused problems. The Luanda Agreement gave impetus to the stalled implementation of the Lusaka Agreement. I differ once again with the Court’s conclusion that the various treaties involving the DRC and Uganda did not constitute consent to the presence of Ugandan troops in the territory of the DRC after July 1999. “Lusaka” and more explicitly “Luanda” continued the validation in law of Uganda’s military presence in the DRC.

24. As regards the right of self-defence, the Court has regrettably come to the conclusion that the legal and factual circumstances for the exercise of this right by Uganda were not present. Accordingly, it refuses to respond to the Parties’ contentions as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, it holds that the preconditions for the exercise of self-defence do not exist in the circum-

² D-Day is the date of the formal signing of the Ceasefire Agreement.

stances of the present case. However, it finds it appropriate to observe in an *obiter* dictum that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks Uganda claimed had given rise to the right of self-defence, nor to be necessary to that end.

25. The refusal by the Court to delve into the question of self-defence arises from its rejection of the evidence submitted by Uganda. The Court relies on the Porter Commission Report as the main evidence on this issue. The role of Brigadier-General James Kazini is central to the Court's findings — on when operation "Safe Haven" commenced and on the question of the occupation of Ituri. Uganda's argument of the alternative view concerning the armed bands is set aside.

26. Thus it seems, in the interest of judicial economy, that the Court has excluded much of the evidence submitted by Uganda on the question of self-defence. This leads the Court to apply insufficient law to insufficient facts; hence the failure by the Court to discharge its judicial function in this respect. For example on the issue of the Sudan, the Court recognizes that an ICG independent report of August 1998 ("North Kivu into the Quagmire") seems to suggest some Sudanese support for the ADF's activities. However, the Court acknowledges that the report also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border. This is a rather surprising position of the Court. If the report implies the Sudan's involvement with the ADF, the Court should have examined it further and linked it to other reports for corroboration purposes. Instead the Court simply quotes the report as stating that the ADF was exploiting the incapacity of the Congolese Armed Forces (FAC) in controlling areas of North Kivu with neighbour Uganda.

27. The Court should have been alerted by the ICG report so as to take into account other corroborating reports of the Sudan's support for anti-Uganda rebels. Such similar documents are another ICG report of 1999 ("How Kabila Lost His Way"), which the Court regards as not constituting reliable evidence. No reason is given as to why the report is not reliable despite its stating that the DRC had effectively admitted the threat to Uganda's security posed by the Sudan. Annex 108 of the DRC's Reply quotes reports that indicate that the Sudan had been flying military supplies from Juba to Kabila forces in Isiro and Dongo. The same reports refer to 4,000 Sudanese soldiers being engaged in the conflict. It is worth noting that Isiro is 320 km from Uganda's borders with the DRC.

28. One could cite more examples about the Sudanese "connection"

with the DRC and its destabilizing effect on Uganda. It suffices for one to cite the factor of the Lord's Resistance Army (LRA). In its Judgment, the Court refers to a Ugandan military intelligence report, which states that in August 1998 the Sudan airlifted insurgents from the WNBF and LRA to fight alongside Congolese forces against RPA and RCD rebels. The Court observes that, even were that proven, the Congo was entitled so to have acted. One is led to remark that it would be a strange concept of self-defence that would allow the airlifting of rebels to the DRC by the Sudan to murder civilians in either Rwanda or Uganda, which countries were in conflict with the DRC. And yet, the Court concludes that there was no tripartite conspiracy between the DRC, the Sudan and the anti-Uganda rebels.

29. As regards the LRA, I wish to underscore the inter-connectivity of the events in the Great Lakes region. The Sudan had been sponsoring the LRA that for nearly 20 years had caused massive and grave violations of human rights and international humanitarian law in northern Uganda. This has led the Prosecutor of the International Criminal Court to indict five leaders of the LRA for crimes against humanity. The Sudan was ferrying the LRA rebels to the DRC in order to create "another frontier" in its conflict with Uganda. It has also been said that Zaire's attempt to evict Congolese Tutsi triggered the Congo crisis. These examples show that the situation in the DRC has an internal, regional and international dimension. Another dimension of the inter-connectivity of events in the region is that the Hima people are to be found in the DRC, Rwanda, Burundi and Uganda. The various pogroms in Rwanda and Burundi led to massive inflows of refugees into Uganda and Tanzania in the 1960s. Hence instability in one country creates instability in another owing to the ethnic composition of the people. In this situation it is not easy to tell whether a person belongs to this or that ethnic group.

30. In this regard, the Court fails to recognize the inter-connectivity of the conflict when it discounts a United States State Department statement of October 1998, condemning the DRC's recruitment and training of former perpetrators of the Rwandan genocide. This lack of awareness by the Court displays itself by not reacting to Uganda's complaints about the DRC's conflation of Uganda and Rwanda in this case. Notwithstanding the fact that Uganda has shown several times in its argument its rejection of offers by Rwanda to participate in joint operations in the DRC, the Applicant in its pleadings, and the Court in its treatment of the evidence, have both unwittingly maintained the impression of not appreciating that Rwanda and Uganda are two different States.

31. As already stated, insurgent activity is at the heart of the conflict in

the region. Even to this day, MONUC is still struggling in joint operations with the DRC to disarm the various rebel groups, both local and foreign (Reuters report of 11 November 2005 on an operation in North Kivu province). The DRC, in its Reply, acknowledges that anti-Ugandan armed groups have been operating from this territory for years: “As they had always done in the past, the forces of the ADF continued to seek refuge in Congolese territory.” (Reply of the Democratic Republic of the Congo (RDRC), Vol. I, para. 3.15.) As if this was right, the DRC argues that no one, and certainly not their Ugandan counterparts, have ever held the Congolese authorities responsible for any of these actions. This implies acquiescence on Uganda’s part.

32. However, Uganda had protested the massacres at Kichwamba Technical School of 8 June 1998 in which 33 students were killed and 106 abducted, an attack at Benyangule village on 26 June 1998 in which 11 persons were killed or wounded, the abduction of 19 seminarians at Kiburara on 5 July 1998 and an attack on Kasese town on 1 August 1998, in which three persons were killed. In spite of all this evidence of brutal and deadly attacks, the Court merely comments that “[t]he DRC does not deny that a number of attacks took place, but its position is that the ADF alone was responsible for them” (Judgment, para. 133). The Court concludes that there is no satisfactory proof of the involvement in these attacks, direct or indirect of the Government of the DRC:

“The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression . . . The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.” (Judgment, para. 146.)

33. Here the Court seems to reconfirm its 1986 dictum in the *Nicaragua* case concerning insurgent activities and what amounts to an “armed attack”. The DRC, in its Reply already referred to, reasserts that the fact of simply tolerating or financing irregular forces is not sufficient to establish a full scale “armed attack”: “For this to be established,” the DRC argues,

“Uganda must prove that the DRC was ‘substantially involved’ in the acts of irregular forces and hence that the Congolese Government had given specific instructions or directions to them or had actually controlled the performance of such acts” (RRDC, Vol. I, para. 3.135).

In its 1986 *Nicaragua* Judgment, the Court stated the following:

“The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 103, para. 195.)

34. The Court has thus stuck to its limited interpretation of Article 3 (*g*) of General Assembly resolution 3314 (XXIX). By so doing, it is encouraging that impunity in that proof of the element of “substantial involvement”, which implies awareness and substantial participation, will be invoked — as the DRC has done in its pleadings in this case — by culprits to avoid responsibility for wrongful acts. We have already referred to the alternative view, which Uganda advanced in the context of self-defence. Even if the Court found that Uganda had not established the legal and factual circumstances for the exercise of a right of self-defence, it should have found that military support by the DRC for anti-Uganda insurgents constitutes unlawful intervention. Instead of doing this, the Court finds that Uganda’s first counter-claim, by which Uganda contends that, since 1994, it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC, cannot be upheld.

35. Thus the effort of Zaire’s President Mobutu (cited in the counter-claim) to overthrow President Museveni’s Government since 1994 — and even earlier since 1986 — is subversive activity, which not only constitutes unlawful intervention in Uganda’s affairs, but also is cumulatively tantamount to an armed attack upon Uganda. In my view this, along with incessant rebel attacks in the post “Zaire era”, would entitle Uganda to exercise the right of self-defence.

36. In this regard, both the Applicant and the Court have advanced the argument of the DRC’s inability to rein in anti-Uganda rebels. In its conclusion on the part of Uganda’s first counter-claim, alleging Congolese responsibility for tolerating the rebel movements prior to May 1997, the Court states:

“During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. However . . . the Court cannot conclude that the absence of action

by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities." (Judgment, para. 301.)

Here, it bears stating that the inability of the DRC to control anti-Uganda rebels operating from the Congo is contrary to the first principle enunciated in the Declaration on Friendly Relations and Co-operation (General Assembly resolution 2625 (XXV) of 24 October 1970): "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces of armed forces of armed bands, including mercenaries, for incursion into the territory of another State."

The same principle is found in the *Corfu Channel* case, where it is stated that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22).

37. From the constant references in the Court's Judgment to the DRC's inability to control anti-Uganda rebels, one may be forgiven for getting the impression that the DRC was facing problems of controlling its territory, at least in the eastern part of its territory. Thus reasons of geography, incapacity or distance have been invoked to avoid attribution of responsibility to the DRC for violations of its obligations to its neighbours, in particular Uganda. Here, a quote from the "Commentary" on the United Nations Charter is apt:

"A special situation arises, if a State is not reluctant but incapable of impeding acts of terrorism committed by making use of its territory. Although such terrorist acts are not attributable to the State, the State victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what Articles 2 (4) and 51 of the Charter are aiming at." (B. Simma (ed.), *The Charter of the United Nations—A Commentary*, 2nd ed., 2002, Vol. I, p. 802, para. 36.)

38. The Court has concluded that Article 51 of the United Nations Charter does not allow the use of force to protect perceived security interests beyond the strict confines there laid down. It adds that other means are available to a concerned State, in which the role of the Security Council will be paramount. It has not elaborated as to whether Uganda was entitled to the use of force on a threshold below "armed attack". Uganda had been calling for the United Nations Security Council to send a peacekeeping force to the DRC. It is not enough for the Court to refer

Uganda to the Security Council. It bears mentioning that many tragic situations have occurred on the African continent due to inaction by the Council.

39. Equally, the Court has accused Uganda of not reporting to the Security Council events that it had regarded as requiring it to react in self-defence. In this connection, I wish to quote from Judge Schwebel's dissenting opinion in the *Nicaragua* case:

“A State cannot be deprived, and cannot deprive itself, of its inherent right [nothing in the Charter shall impair that inherent right, including the requirement of reporting to the Security Council the measures taken] of individual or collective self-defence because of its failure to report measures taken in the exercise of that right to the Security Council.” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 377, para. 230.)

This reporting requirement has been abused by aggressor States to justify themselves that by reporting, they had complied with Article 51 of the Charter concerning self-defence. Hence this requirement should be handled with caution when it comes to issues of self-defence. In practice, in some cases, some States are not aware that they are required to report measures taken. While this is not an excuse, it should be regarded as an extenuating circumstance.

40. I have voted in favour of the second operative clause of the *dispositif* concerning the events in Kisangani. My vote in favour is in respect of the hostilities between Ugandan and Rwandan military forces in Kisangani. The mere fighting violated the sovereignty and territorial integrity of the DRC. I cannot, however, in good conscience, pronounce myself on the violations of human rights and international humanitarian law because there were such violations by the many parties to the DRC conflict, including the DRC. In this regard, my voting in favour of the fifth and sixth operative paragraphs of the *dispositif* is only in respect of the events in Kisangani. As I state below, I disagree with the Court's findings on violations of human rights and international humanitarian law and the unlawful exploitation of the DRC's natural resources and thus cannot support a general finding for the making of reparation to the DRC on these matters.

41. I also agree with the Court on the admissibility of the DRC's claims in relation to Uganda's responsibility for the events in Kisangani. It is not necessary for Rwanda to be a party to this case in order for the Court to determine whether Uganda's conduct violated rules of international law. While the indispensable third party principle does not apply

here, one must reiterate that the DRC's conflation of Rwanda and Uganda is uncalled for.

III. HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

42. The Court has found that Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of abuses, failed to discriminate between civilian and military targets and to protect the civilian population, trained child soldiers, incited ethnic conflict and failed to take measures to end such conflict; as well as by its failure as the occupying Power to take measures to respect and ensure respect for human rights and international humanitarian law in the district of Ituri, violated its obligations under international human rights law and international humanitarian law.

43. I have voted against this over-arching finding which mixes up several issues. The finding contains serious accusations against Uganda. As such a higher standard of proof is required: "A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here." (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 17.) It would also seem pertinent to cite the observation by Judge Higgins in her separate opinion in the *Oil Platforms* case:

"Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court (who already will know they bear the burden of proof) as to what is likely to satisfy the Court." (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Judgment, I.C.J. Reports 2003*, p. 234, para. 33.)

44. At the outset of considering this finding by the Court, it bears repeating that there were massive and egregious violations of human rights and international humanitarian law in the DRC. As already observed, the DRC itself is not absolved from blame. Various reports in the public domain state that vile crimes have been perpetrated in the DRC. Four million people have died since the conflict began there. As counsel for Uganda stated during the oral proceedings

"a . . . balanced picture . . . without angels and without demons. It is not a picture without victims, however, because both Uganda and

the DRC are victims. Victims yes, but entirely innocent, no, because there is no one in this picture who is totally without blame.” (CR 2005/6, p. 58.)

45. As evidence of the serious accusation against Uganda for the violation of human rights and international humanitarian law, the Court relies on the sixth MONUC report of February 2001 and the MONUC’s special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004). The Court proceeds to state that the United Nations documents are corroborated by other credible sources of NGOs, such as the HRW’s report of July 2003, which is available at <http://hrw.org/reports/2003/ituri0703>. For its part, Uganda asserts that the reports are unreliable and partisan (cites ASADHO, a Congolese NGO as a case in point). Uganda makes the following arguments that (a) MONUC did not have a mission (on the ground) appropriate to investigations of a specifically legal character; (b) the MONUC report makes assumptions about the causes of the Hema-Lendu conflict, assumptions which have no historical basis; (c) Uganda finds it anomalous and open to serious question the supposition that in Ituri Uganda forces should be associated with patterns of abuse when this did not occur in other regions. In my view, these are cogent reasons which the Court should have taken into serious consideration before reaching its finding that Uganda violated human rights and international humanitarian law in the DRC.

46. I find it remarkable that the DRC accuses Uganda of carrying out a deliberate policy of terror. Wisely, the Court did not endorse this rather excessive charge. On the basis of the “clean hands” theory — the principle that an unlawful action cannot serve as the basis of an action in law — the DRC should be debarred from raising such accusations.

47. Having in mind the seriousness of the accusations levelled by the DRC, the Court should have been more cautious and demanded satisfactory evidence before concluding that the UPDF killed, tortured, and committed other forms of inhumane treatment against the Congolese civilian population. Relying on reports of the Special Rapporteurs and MONUC reports is not advisable. As is known, on a number of occasions, reports of the Special Rapporteurs of the Human Rights Commission have generated controversies of a political and legal nature. Instead of helping to find a solution to the situation in question, the reports were ignored by some of the addressees on the grounds that they lacked objectivity. In some cases, the writers of the United Nations reports have no access to the countries concerned. In other cases, they are ill-informed and thus end up writing speculative reports as will be illustrated in the next section of this opinion.

48. In this regard, I am troubled by the Court’s finding that there is persuasive evidence that the UPDF incited ethnic conflicts and took no

action to prevent such conflicts in the Ituri region. It is strange that Uganda, which had its military presence elsewhere in the DRC, should be accused of such a charge only in Ituri. Allegations against Uganda of inciting ethnic conflict between the Hema and Lendu are based on a mistaken view of the area in question where 18 different ethnic groups live side by side. Uganda acknowledges the long-standing rivalry between the Hema and Lendu. Such rivalry had led to massacres of civilians. Uganda stood to gain nothing by inciting ethnic conflict. As explained earlier, the spread of the different ethnic groups in the Great Lakes region is such that based on history and recent experience, it would be folly for any country to try to fan ethnic rivalry. It would boomerang.

49. From the United Nations reports, it seems that the rebel groups in the DRC are the ones that recruited child soldiers and ferried them to Uganda. For example, the RCD-ML is said to have halted its military recruitment campaign due to the growing protest of UNICEF and MONUC. Indeed, Uganda granted access to UNICEF to the children at Kyankwanzi (RDRC, Ann. 32, para. 85). Once again, in my view, there is no evidence to justify the Court's conclusion that Uganda recruited child soldiers in the DRC.

IV. THE UNLAWFUL EXPLOITATION OF NATURAL RESOURCES

50. I have voted against the fourth operative clause of the *dispositif* that finds that Uganda violated obligations owed to the DRC under international law, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the DRC and by its failure to comply with its obligations as occupying Power in the Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources.

51. Counsel for the DRC stated during the oral pleadings that

“this is the very first time that the Court has been called upon to address the responsibilities of a State for the illegal exploitation of natural resources which are located in the territory of another State which it occupies” (CR 2005/5, p. 15).

Counsel for Uganda agreed with this observation. Hence given the nature and the gravity of the charge, a higher standard of proof is required on the part of the Applicant to prove that the Respondent committed these acts of plunder and pillage. The DRC cited various sources for its evidence, including the United Nations Panel reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC. It

also cited the Porter Commission, which was set up by the Government of Uganda to investigate allegations made in United Nations Panel reports, as confirming the accusation of unlawful exploitation of Congolese natural resource.

52. There is a lot of doubt concerning the reliability of the United Nations Panel reports. Even the Porter Commission Report, on which the DRC and the Court rely for evidence on exploitation, criticized the methodology followed by the United Nations Panels. It states that “it would seem that the majority of evidence likely to be obtained by such a methodology [of flexible data collection] would be either hearsay, biased or pure gossip, all untested” (Porter Commission Report, p. 7). Thus the United Nations Panel report of 12 April 2001 cites “some sources” as saying that the Presidents of Rwanda and Uganda and the late President Kabila were shareholders in BCDI (Banque de commerce de développement et d’industrie, located in Kigali). The Panel then concludes in the same paragraph, “[b]ut this was not the case” (RDRC, Vol. III, Ann. 69, para. 29). In paragraph 52, the Panel report alleges that some members of President Museveni’s family were shareholders of DGLI (The Dara Great Lakes Industries, of which DARA Forest is a subsidiary). Then the Panel adds “although more investigation is needed” (*ibid.*, Ann. 69, para. 52).

53. This is the type of gossip that emerges from these United Nations documents. Thus the Court was forced to rely on the Porter Commission Report, which according to the Court provides sufficient and convincing evidence. Here one must caution again over reliance on a single source as evidence to prove allegations, not only of unlawful exploitation of the DRC’s natural resources, but also of the use of force. In any case, the Porter Commission found that there was no Ugandan governmental policy to exploit the DRC’s natural resources. The Commission also found that individual soldiers engaged in commercial activities and looting were acting in a purely private capacity.

54. In this respect, I find myself in disagreement with the Court’s conclusion that Uganda is internationally responsible for the acts of exploitation of the DRC’s natural resources and has violated its obligation of due diligence in regard to these acts, of failing to comply with its obligation as an occupying Power in Ituri. The Ugandan soldiers, who committed acts of looting, did so in violation of orders from the highest Ugandan authorities. In his radio message of 15 December 1998 to COs and all UPDF units in the DRC, President Museveni said the following:

- “1. Ensure that there is no officer or man of our forces in Congo who engages in business.
2. Also report to me any other public servant whether currently based in Congo or not who tries to engage in business in Congo.” (Rejoinder of Uganda (RU), Vol. III, Ann. 31.)

Hence, in my view, individual acts of UPDF soldiers, committed in their private capacity and in violation of orders, cannot lead to attribution of wrongful acts. Paragraph 8 of the Commentary to Article 7 of the draft Articles of the International Law Commission 2001 distinguishes between unauthorized, but still “official” conduct, on the one hand and “private” conduct on the other.

55. As noted earlier, the Court reached a finding of occupation in order to rationalize its finding on human rights and international humanitarian law. It has done the same in respect of the alleged unlawful exploitation of the DRC’s natural resources. From this finding, it is easy to invoke *jus in bello* in order to engage Uganda’s international responsibility for acts and omissions of Ugandan troops in the DRC. Uganda has argued that it did not control the rebel groups that were in charge of parts of eastern Congo in general and in Ituri in particular. Its limited military presence could not have made this possible. In any case, the Respondent just — as I do — does not find the contention of occupation to be proven.

56. The Court has rightly, in my view, not accepted part of the DRC’s final submission on the violation of the Congo’s permanent sovereignty over its natural resources (PSNR) because this has not been proven. The PSNR concept is embodied in General Assembly resolution 1803 (XVII) of 1962. The PSNR was adopted in the era of decolonization and the assertion of the rights of newly independent States. It thus would be inappropriate to invoke this concept in a case involving two African countries. This remark is made without prejudice to the right of States to own and or dispose of their natural resources as they wish.

V. LEGAL CONSEQUENCES

57. In its fourth submission, the DRC requests the Court to adjudge and declare that Uganda ceases all continuing internationally wrongful acts, adopt specific guarantees and assurances of non-repetition and make reparation for all injury caused. In this regard, I agree with the Court that there is no evidence of continuing illegal acts on the part of Uganda in the DRC. As such, there is no need for the Court to make any

ruling on cessation. Uganda, as the DRC acknowledges, withdrew its troops from the DRC on 2 June 2003. There is therefore no need for specific guarantees and assurances of non-repetition. The Court has taken judicial notice of the Tripartite Agreement on Regional Security in the Great Lakes of 26 October 2004. This Agreement between the DRC, Rwanda and Uganda provides for obligation to respect the sovereignty and territorial integrity of the countries in the region and cessation of any support for armed groups or militias.

58. Concerning reparation, this could follow at a subsequent phase of the proceedings, if the Parties fail to reach agreement after negotiations.

VI. COMPLIANCE WITH THE COURT'S ORDER ON PROVISIONAL MEASURES

59. The DRC requests the Court to adjudge and declare that Uganda has violated the Order of the Court on provisional measures of 1 July 2000 by not complying with the three provisional measures, namely, *(a)* refrain from armed action in the DRC; *(b)* compliance with obligations under international law, in particular the United Nations and OAU Charters and Security Council resolution 1304 (2000); and *(c)* respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.

60. The Court notes that the DRC put forward no specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures. However, the Court finds that Uganda has violated provisional measures concerning human rights and international humanitarian law through actions of Ugandan troops during the period of their presence in the DRC, including the period from 1 July 2000.

61. The Court's finding that Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000 shows, as indicated earlier, lack of concern for the action taken, not in good faith, by the Applicant to raise this issue against the Respondent when the Applicant itself has committed grave violations of human rights and international humanitarian law. Thus, I am constrained not to support the position of the Court on its finding. The Court, in my view, should not have dealt with the violation of the provisional measures. I have already referred to the "clean hands" theory, which I deem to be apt on this issue as well.

VII. COUNTER-CLAIMS

62. Uganda's first counter-claim relates to acts of aggression allegedly committed by the DRC. The second relates to attacks on Uganda's diplomatic premises and personnel in Kinshasa and on Ugandan nationals. The third counter-claim was ruled inadmissible by the Order of the Court of 29 November 2001.

63. I agree with the Court's reasoning, which rejects Uganda's claim that the DRC is not entitled at the merits phase of the proceedings to raise objections to the admissibility to the counter-claims submitted by Uganda. In the *Oil Platforms* case the Court ruled that Iran was entitled to challenge "the 'admissibility' of the [United States'] counter-claim" on the merits (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 210, para. 105).

64. I have voted in favour of operative clause 8 of the *dispositif* by which the Court rejects objections of the DRC to the admissibility of the first counter-claim submitted by Uganda. Before proceeding with further consideration of this counter-claim, I wish to make a general comment on the way the Court has treated this claim of Uganda which is the Applicant in this context and the DRC is the Respondent. It is a matter of regret that the Court agrees with the DRC's division of the first counter-claim into three periods. The Court invokes the excuse of "practical purposes" in agreeing to divide the counter-claim into three periods: (a) the Mobutu era, i.e., before May 1997; (b) the Kabila period, i.e., May 1997-August 1998; (c) the period after 2 August 1998.

65. This "slicing" technique of the first counter-claim is to the disadvantage of Uganda because as the Applicant in this respect points out "the DRC is seeking to limit Uganda's counter-claim". Uganda maintains that Zaire and the DRC are not distinct entities and by virtue of the State continuity principle, it is precisely the same legal person, which is responsible for the acts complained of in the first counter-claim. The division of the counter-claim makes it difficult to follow the reasoning of the Court. Admissibility issues are mixed with those of merits. It would have been better if the first counter-claim had been dealt with in its entirety, without dividing it into three periods.

66. I have voted against paragraph 9 of the *dispositif* by which the Court finds that the first counter-claim submitted by Uganda cannot be upheld. I find myself in disagreement with the Court's dismissal of the evidence submitted by Uganda — for the first period of the first counter-claim — when it argues that evidence is of "limited probative value" when it is "neither relied on by the other Party nor corroborated by impartial, neutral sources" (Judgment, para. 298). This observation of the Court concerns President Museveni's address to the Ugandan Parlia-

ment on 28 May 2000 entitled “Uganda’s Role in the Democratic Republic of the Congo”. Evidence by the NGO Human Rights Watch (HRW) is regarded as “too general to support a claim of Congolese involvement . . .” (Judgment, p. 298). I do not share the Court’s characterization and treatment of this evidence.

67. In relation to the second period of the first counter-claim, the Court finds that Uganda has failed to provide conclusive evidence of actual support for anti-Ugandan rebel groups by the DRC. The Court notes, with approval, the improved relations between the two Parties. The Court should have remembered its earlier observation that “[t]he political climate between States does not alter their legal rights” (Judgment, para. 294). The Court comments that this period is marked by clear action by the DRC against rebels. If it had accepted evidence by Uganda, it would have noted the “dual role” by the Congolese highest authorities of seeming to co-operate with Uganda while at the same time fraternizing with the Sudan and anti-Ugandan rebels.

68. Regarding the second counter-claim, I have voted in favour of rejecting the DRC’s objection to the admissibility of the part of the claim relating to the breach of the 1961 Vienna Convention on Diplomatic Relations (paragraph 10 of the *dispositif*). I agree with the Court’s reasoning in its interpretation of the Order of 29 November 2001.

69. I have voted against operative paragraph 11 of the *dispositif*, which upholds the objection of the DRC to the admissibility of the part of the second counter-claim relating to the maltreatment of persons other than Ugandan diplomats at Ndjili Airport on 20 August 1998. The invocation by Uganda of the international minimum standard relating to the treatment of foreign nationals is considered by the Court as an exercise of diplomatic protection. Thus according to the Court, Uganda would need to meet the conditions necessary for the exercise of diplomatic protection, namely, the requirement of Ugandan nationality of the claimants and the prior exhaustion of local remedies. The Court avoids dealing with the issue of these persons on the grounds that it has not been established that they were Ugandan nationals. In my view, the Court should have invoked international humanitarian law to protect the rights of these persons. The Court would seem not to have given enough weight to violations of the rights of these persons at Ndjili Airport by the DRC.

70. I voted in favour of operative paragraph 12, which finds that the DRC has violated obligations owed to Uganda under the 1961 Vienna Convention on Diplomatic Relations by Congo’s armed forces, maltreating Ugandan diplomats and other individuals at the embassy premises, maltreating Ugandan diplomats at Ndjili Airport, as well as its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and failure to protect archives and property from seizure.

I also agree with the Court that it will only be at a subsequent phase, failing an agreement between the Parties, that the issue of reparation to Uganda will be settled by the Court.

(Signed) J. L. KATEKA.
