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International Court
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THE HAGUE

ANNÉE 2021

Audience publique

tenue le lundi 26 avril 2021, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

*en l'affaire des Activités armées sur le territoire du Congo
(République démocratique du Congo c. Ouganda)*

Réparations dues par les Parties

COMPTE RENDU

YEAR 2021

Public sitting

held on Monday 26 April 2021, at 3 p.m., at the Peace Palace,

President Donoghue presiding,

*in the case concerning Armed Activities on the Territory of the Congo
(Democratic Republic of the Congo v. Uganda)*

Reparations owed by the Parties

VERBATIM RECORD

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
M. Daudet, juge *ad hoc*
M. Gautier, greffier

Present: President Donoghue
Vice-President Gevorgian
Judges Tomka
Abraham
Bennouna
Yusuf
Xue
Sebutinde
Bhandari
Robinson
Salam
Iwasawa
Nolte
Judge *ad hoc* Daudet
Registrar Gautier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon for the second and final session of questioning of the Court-appointed experts. I would like to note for the record that, today, the following Judges are present with me in the Great Hall of Justice: Judges Tomka, Bennouna, Yusuf, Xue, Sebutinde, Iwasawa and Nolte; while Vice-President Gevorgian, and Judges Abraham, Bhandari, Robinson and Salam and Judge *ad hoc* Daudet are participating by video link. The first expert to take questions this afternoon is Mr. Geoffrey Senogles, who has joined the meeting by video link. Good afternoon, Mr. Senogles. I call upon you to make the solemn declaration for experts as set down in Article 64, subparagraph (b), of the Rules of Court.

Mr. SENOGLES: Of course. I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth and that my statement will be in accordance with my sincere belief.

The PRESIDENT: Thank you. I now give the floor to Professor Philippe Sands to put questions to Mr. Senogles on behalf of the Democratic Republic of the Congo. You have the floor, Professor Sands.

Mr. SANDS: Thank you very much, Madam President. And good afternoon, Mr. Senogles. I have a number of questions for you which will last about 30 minutes, so I'd be most grateful if you could keep your responses as short as possible.

Could you begin, Mr. Senogles, by telling us your professional qualifications and your areas of specialism and expertise.

Mr. SENOGLES: Yes. First of all, good afternoon to you, Professor Sands, and thank you very much indeed for the pronunciation of my name, which is very good, thank you. Senogles. I'm a partner, I'm a chartered accountant. I'm *originally* from Wales. I've been living here in Switzerland for 20 years. I am speaking to you from our office in Nyon, which is between Geneva and Lausanne.

Senogles & Co. is a small firm of chartered accountants. We specialize in loss evaluations, in international arbitration, litigation, insurance work. We work for third-party funders. We also do investigations and private client work. And for the last decade or so — over a decade I've lectured

on financial damages in a couple of Swiss universities on LLM programmes including MIDS. Probably the best well-known.

Mr. SANDS: Yes, some of us know, MIDS.

Mr. SENOGLES: I'm sure you do. Thank you.

Mr. SANDS: How many years' experience do you have in working on matters of quantum and assessing reparations?

Mr. SENOGLES: Since 1995. I've been in practice since 1989, and specialized in forensic accounting since 1995, first *off* in the UK, since 2000 here in Switzerland.

Mr. SANDS: And you have international experience. You've hinted at it — international courts and tribunals, commissions, arbitration; is that correct?

Mr. SENOGLES: Correct.

Mr. SANDS: And you have particular experience which you refer to of working with the United Nations Compensation Commission; is that correct?

Mr. SENOGLES: It is, Professor Sands. I moved here with my family in 2000 to work for the United Nations Compensation Commission. I spent three years on staff there and was subsequently kept on as an external independent consultant.

Mr. SANDS: And just to touch on the various matters you might have addressed in matters of quantum: in a very brief answer, you've dealt with the death of human beings?

Mr. SENOGLES: I have.

Mr. SANDS: Physical injury?

Mr. SENOGLES: Yes.

Mr. SANDS: Sexual violence?

Mr. SENOGLES: In regard to this matter, yes.

Mr. SANDS: Child soldiers?

Mr. SENOGLES: In this case, yes.

Mr. SANDS: And the displacement of human beings, populations.

Mr. SENOGLES: I have.

Mr. SANDS: And you mention in your report that you've performed this kind of advisory and expert role in, I think, many hundreds of cases; is that correct?

Mr. SENOGLES: I've — well, yes. Yes.

Mr. SANDS: And in this case you've been appointed by the Court, so you're not the Congo's expert; you're not Uganda's expert; you are independent; is that correct?

Mr. SENOGLES: Absolutely. My focus, Madam President, is to help you and the members of the Court. It's been my focus throughout this mandate, and I will be addressing my answers to the Court today.

Mr. SANDS: And you were asked, were you not, by the Court to provide estimates as to the quantum of recommended reparation amounts for human deaths as well as damage to and looting of property; is that correct?

Mr. SENOGLES: Correct.

Mr. SANDS: And you provided a first report on 19 December 2020?

Mr. SENOGLES: I believe it was dated the 20th.

Mr. SANDS: Well —

Mr. SENOGLES: Sorry, no, you are correct, 19th. 19th. Correct.

Mr. SANDS: And the second one that I believe my version is dated 1 March 2021.

Mr. SENOGLES: Saint David's day — correct.

Mr. SANDS: Even better, Mr. Senogles.

Uganda has suggested that you have somehow provided evidence that goes beyond your terms of reference. Could you give us a brief reaction to that assertion?

Mr. SENOGLES: I believe that I've sought to help the Court. I know that sounds a very general answer. But if I have gone outside the bounds of my terms of reference, then, Professor Sands, my only reaction could be: it will be for the Court to decide, if they so choose, to ignore and have no regard to my recommendations and my opinion. It's there for the Court. I believe I've fulfilled my TOR.

Mr. SANDS: Just to reassure you, Mr. Senogles, there is no criticism from the Congolese side.

In preparing your report — to put the question another way, I suppose, do you consider that you are asked to address all the topics that you have in fact addressed?

Mr. SENOGLES: I do.

Mr. SANDS: Let's turn now to matters of substance. Would you agree, in general terms, that advising on matters of quantum is something of an art rather than a science?

Mr. SENOGLES: I absolutely agree. And I can illustrate that. It's often a surprise to my LLM students: I ask exactly that question to them every year. And each of them regard it as a science, and I correct them, from a position of experience, it's an imprecise science and it's more like an art. I agree. There is judgment involved, Professor Sands. That's —

Mr. SANDS: I was coming exactly to that as my next question: whether you would agree that assessing the quantum of compensation is a matter that requires an exercise of judgment?

Mr. SENOGLES: Absolutely I do.

Mr. SANDS: It's not something that is done mechanically?

Mr. SENOGLES: In my view, it should not be done mechanically.

Mr. SANDS: And would you say that the exercise of such judgment is assisted by experience?

Mr. SENOGLES: Yes, I would.

Mr. SANDS: So let's turn against that background to the valuation of a human life. It's obviously an extremely sensitive and delicate matter. I think everyone involved in these proceedings is fully aware of that.

I act, as you know, for the Democratic Republic of the Congo, and the Democratic Republic of the Congo has proposed that an appropriate figure for each life, as they have put it, is US\$34,000 for direct deaths and US\$18,900 for indirect deaths. Your first report concludes with a single figure of US\$30,000. Would you accept that your figure is reasonably close to that of the Democratic Republic of the Congo?

Mr. SENOGLES: I would.

Mr. SANDS: And in your professional experience, the exercising of a judgment, art rather than science, is it your view that the approach taken by the Democratic Republic of the Congo on the basis of the evidence it has been able to tender, is a reasonable approach?

Mr. SENOGLES: In regard to the US\$34,000 for loss of life as a direct consequence of violence? If that's the question —

Mr. SANDS: That is the question indeed, yes.

Mr. SENOGLES: Yes. I believe that the Democratic Republic of the Congo tried to provide evidence based on Congolese courts that supported the use of US\$34,000, which was an average, as they stated. I'm sure that the Court will recall from my report that I did not see that those court reports that were supplied were sufficient to back up that figure of US\$34,000 and I then went on, as you have implied, to exercise what I regard as appropriate judgment.

Mr. SANDS: Yes, and we'll come in a moment to your methodology. Now, I just want to make absolutely clear we understand you have not in any way been asked to address matters of attribution, or the number of individuals whose deaths may or may not be attributable to Uganda between 1998 and 2003. That's the correct position; right?

Mr. SENOGLES: Correct. And thank you for clarifying that. Thank you. I appreciate it.

Mr. SANDS: Again, I wanted to reassure. A figure that you've settled on, of US\$30,000, is that in any way affected by the number of persons who may have been killed?

Mr. SENOGLES: No.

Mr. SANDS: So it makes no difference if we're talking about 1,000 people or 50,000 people or 400,000 people; on each count, your figure would still be US\$30,000, would it?

Mr. SENOGLES: Correct.

Mr. SANDS: So the fact that your figure, with whatever number of deaths the Court may eventually find as being attributable to Uganda, might lead to a very large sum does not change your position. Is that correct too?

Mr. SENOGLES: That's a correct statement of the situation.

Mr. SANDS: Your first report refers to the UNCC compensation payments in excess of US\$50 billion to more than 1.5 million claimants. That's what you say at paragraph 95 of your report.

Mr. SENOGLES: I do say that. But just to clarify for the Court, those figures that Professor Sands quotes are correct, but they include all claims, all types of claims, not just individual.

Mr. SANDS: Yes, absolutely. The simple point that I make is that in an international claim, sometimes the organization may arrive at a very large figure.

Mr. SENOGLES: Right. Yes.

Mr. SANDS: Have you had a chance to read Professor Guha-Sapir's conclusions?

Mr. SENOGLES: I'll be honest with you, no. I've kept myself separate from Henrik's and Debarati's and Michael's separate reports. We've worked together, but we very much focus on our own areas of expertise.

Mr. SANDS: No, that's absolutely fine. From our perspective, there was no requirement that you . . . it was just I was trying to work out that the US\$30,000 you come to, against the numbers that she has settled on, which are large numbers, would lead to a very large compensation payment, reparations payment. You are comfortable with that, are you?

Mr. SENOGLES: It would be a function of the mathematics. Simple as that. It has no effect on my opinion on each individual death.

Mr. SANDS: So at that point it is more of a science, once you've got the numbers of people killed and the valuation of a life?

Mr. SENOGLES: You have me there, Professor Sands. You're correct, yes.

Mr. SANDS: If you're good at maths, you're okay?

Mr. SENOGLES: If you can do the sums, ultimately you'll be all right.

Mr. SANDS: I'm not going to ask you to do any sums.

Mr. SENOGLES: Thank you.

Mr. SANDS: Turning on the methodology, you've explained a little bit that you preferred not to go with the position in the Democratic Republic of Congo courts, but you adopted a different methodology. Again, it's not a criticism in any way. And you've primarily settled on the approach taken by the United Nations Compensation Commission (UNCC). Could you explain briefly why you focused on that approach?

Mr. SENOGLES: Yes, of course. Several reasons. The first reason is I believe it to be an appropriate and a relevant experience. It's a similar period in time, 2 August 1990-~~It~~ was the Iraqi invasion of Kuwait; 1998 to 2003 was *the period of* hostilities that this case is talking about. We're

talking about military hostilities, we're talking about post-conflict reparations. So there are similarities. The UNCC, self-evidently, is a United Nations organization. It still exists. It has that level of credibility. The amounts have been paid. All of the individual claimants have been paid out in full.

There were reduced evidentiary requirements. I saw it as a relevant and useful guide. Paragraphs 52 and 54 of my response paper, 1 March, I think — I hope — at least clarify that it is not the benchmark. It is not the reference point. It is a useful guide for the Court to consider.

Mr. SANDS: And was one of the reasons you felt comfortable referring to the UNCC approach was that its approach was compensatory? It was not punitive? It was not intended to punish anybody?

Mr. SENOGLES: Absolutely. I can tell the Court, in my three years working in the United Nations Compensation Commission, plus I was there for probably another three or four years as an independent external consultant, punitive damages were not mentioned. It was not a phrase that I heard in the UNCC.

Mr. SANDS: In preparing your report and the response report, and for the hearing today, have you had an opportunity to read the Judgment of this Court in the 2005 case?

Mr. SENOGLES: In parts, Professor Sands. I'm not going to say I've read it all.

Mr. SANDS: I'm not about to test you on individual paragraphs, you'll be relieved to know.

Mr. SENOGLES: Thank you.

Mr. SANDS: But you're broadly aware of the findings of the Court, credible evidence at paragraph 211 of the Judgment, to conclude that Ugandan troops committed acts of killing, torture, damage to property, so on and so forth?

Mr. SENOGLES: Broadly, yes.

Mr. SANDS: That you're broadly familiar with. And in lacking a punitive or retributive function, coming back to the UNCC's approach, that approach is similar in some ways to the

approach taken by regional human rights courts at international level. Have you had an opportunity to have a look at any of the judgments of various human rights courts at the international level on reparations for loss of life?

Mr. SENOGLES: At the very broadest level, highest level, in no detail, but I am broadly aware of them. I have done research for other matters, in fact. I have a broad awareness of them. I'll go no further than that.

Mr. SANDS: Yes. I mean, the Inter-American Court of Human Rights, have you ever had a chance to look at some of their judgments?

Mr. SENOGLES: Yes.

Mr. SANDS: And so you may or you may not be aware, for example, in the case of *Aloeboetoe v. Suriname*, a 1993 judgment, the court gave an average total award per deceased victim of US\$65,000?

Mr. SENOGLES: Yes.

Mr. SANDS: *El Amparo v. Venezuela* — a 1996 case — US\$67,000. I could go on with the list, these four cases from the mid-1990s, or two cases from the mid-1990s. Surprisingly little variation in the quantum. The victims lived in different States. They had different average wages, had different numbers of relatives and dependants. Did findings such as this reassure you or trouble you with regard to the figure you've come up with?

Mr. SENOGLES: It reassures me. It does not trouble me in any way. I think the Court — I don't need to tell the Members of the Court — but the Court will be aware that this is a broad-brush approach. It is self-evidently an average figure. It does not take each individual person's circumstances into account. There's no gender distinction, no age distinction, no occupation *distinction*. There's no earning capacity distinctions made. These are broad figures. So US\$30,000 in the UNCC's case in Kuwait 1990, mid-US\$60,000s for Inter-American: no, I'm comfortable with these.

Mr. SANDS: Thank you, Mr. Senogles. I wonder now if we can turn to a criticism that Uganda has made of your approach. Uganda says, and you have addressed this in your second report, that you should rather have relied not on the United Nations Compensation Commission but on the Eritrea-Ethiopia Claims Commission (EECC). They describe that as a more relevant precedent than the UNCC. You address this at paragraphs 56 to 68 of your report, quite fully, if I may say, and you make the following point at paragraph 68:

“This methodology used by the EECC, deriving round sums compensation amounts in respect of a given group of impacted individuals, is not available to me as a basis for my recommendations to the Court.”

Is that because we don't know from the award of that Commission what precisely is the methodology they set out?

Mr. SENOGLES: I think, Professor Sands, that's part of the answer, yes. The Court will see in paragraph 65 — one of the paragraphs you generally quoted: in paragraph 65 of my same report, it quotes paragraph 103 of the EECC final damages award, which provides the US\$11,000,000 award.

It's because the EECC, quite appropriately, because it has its own methodology, did not provide the reader, did not provide the Parties, with a breakdown of how they calculated the 11 million round-sum award. It's better done by four categories of loss and, for each category of loss, there would be, one would imagine: the number of individuals multiplied by an amount of compensation.

Each of those calculations is repeated four times, and the *total* figure is derived to be US\$11,000,000. So, there is no transparency into how that 11 million is calculated.

Mr. SANDS: Might it be fair to put it another way: that there is no calculation methodology? You don't know the numbers of victims. You don't know the assessment per victim.

Mr. SENOGLES: Correct.

Mr. SANDS: And so, a more broad question: what would you say is the precedential value of an award or a decision like that, that doesn't set out a calculation methodology?

Mr. SENOGLES: That's an interesting question. I think that it provides the Court with another reference point. But in terms of the methodology that I have been asked to apply — which, again, goes back to your first questions, Professor Sands: I was asked to look at only the amount per person. I am merely an accountant. I have no input on the number of people who will be — whose death would be found by the Court to be attributable.

So, I've been tasked with providing the Court with one of the variables within the formula that this Court is seised with applying.

The precedential value of the EECC, in terms of the calculations, I think, is limited. I think that in my paragraph 59 — another paragraph that you've generally referred to — it's an extremely interesting and useful series of paragraphs that the EECC provides in terms of their standard of proof and their evidentiary requirements. So that provides useful context to this Court.

But in terms of the strict calculations, Professor Sands, the 11 million and the 2 million for rape provides little to this Court.

Mr. SANDS: Did you notice that the award of the EECC makes no reference to any use of independent expert?

Mr. SENOGLES: Yes, yes.

Mr. SANDS: This Court (and here I speak personally) rather wisely reached out, it might be said, to four independent experts to assist it, but do you agree that on the basis of the award, there's no indication that the EECC reached out and did an equivalent exercise?

Mr. SENOGLES: There's nothing to say that they did.

Mr. SANDS: As far as we know, there's no indication that they retained the assistance of any experts like you.

Mr. SENOGLES: Based upon what's written in the award, I would agree with that.

Mr. SANDS: And so if you were a decision-maker on such a thing, taking account of your expertise, and you had a choice of placing reliance on an award which offered *no* calculation

methodology — the EECC on the one hand — and one which *did* — the UNCC on the other — which would you tend to draw a more useful lesson from?

Mr. SENOGLES: As I put in my first report, Professor Sands, I would — first of all, I congratulate this Court for contacting four people with expertise. I'm honoured to be here. I would definitely say that this Court has made the right choice, not in terms of which accountant they chose but in terms of choosing an accountant, I would — as I have put in my first report — I would go with the UNCC. It would provide an established and a recognized international claims commission basis that provides the level of granularity that I think is useful to this Court. It was interesting — very, very briefly, Professor Sands. I know the time is going — it was interesting to me, and useful to me, that Uganda wrote approvingly more relevant and more pertinent about the EECC methodology and that I should refer to that also. And in looking at that, I find their standard of proof discussions and their evidentiary discount fact of discussions extremely useful. But in terms of their calculation for loss of life, somewhat less than useful.

Mr. SANDS: That's very helpful, Mr. Senogles, because it seems that the Ugandan team has prompted you also in relation to the UNCC to look again at your figures. In short— and I hope they will forgive me, I paraphrase — they say you've looked at the wrong panel awards. You've taken the Panel C awards and you should have taken the Panel B awards, and that the figure that you should have come up with by reference to that, they say, is closer to US\$10,000. Could you just briefly summarize your response to that critique?

Mr. SENOGLES: I think what I've done is appropriate. Again, I reiterate to the Court that what I've provided, I think, is a figure which is not unreasonable: US\$30,000. So, this is partly results-driven. I think the UNCC put a lot of work into their figures. I must clarify that I was not involved with the personal losses in the UNCC. I was only recruited in 2000, by which time all of these personal claims had been decided and paid.

But US\$30,000 to me seemed like a — seems, present tense — seems like an entirely appropriate figure for this Court to view as a reference guide in these present circumstances.

Mr. SANDS: And just to be clear. Just to tease out the basis for that, you say in paragraph 76 of your second report, that your view remains that US\$30,000 is right. And you say that that's based, and I quote, "on the evidentiary constraints likely to have been faced by Congolese individuals". That is a part of your reasoning, is it?

Mr. SENOGLES: It's absolutely that, yes. I think, again, we go back to the art and the science. We have to be cognisant of the real world when you're assessing claims. Paragraphs 76 and 77.

Mr. SANDS: And did you happen to watch, last Friday, Professor Guha-Sapir's address? Did you watch her testimony last week?

Mr. SENOGLES: I did.

Mr. SANDS: And you'll have heard, perhaps, that in response to a question from Judge Robinson, concerning the possibility of finding mortuary reports and death certificates and various other materials, she said there is no institution in the region of the Congo that would even register the death of a five-year-old child. She made pretty clear that the idea of death certificates, mortuary reports was, in my words, pretty hopeless.

On the basis of your preparation for your two reports in this testimony, would you agree with her assessment?

Mr. SENOGLES: I would agree. And I can talk from personal experience that I have worked — going back to one of your first questions about international experience — I have worked in several jurisdictions all over the world, where I've spent my working life based in the UK and in Switzerland, two relatively sophisticated and developed countries where accounting records, where institutional structures, are present. I've worked in many other places where those background and those expectations are not present.

And you have to adjust. In my view, you have to adjust.

Mr. SANDS: And, so, would it be fair, by way of conclusion on this point, to say that your figure of 30,000 is in some way informed by evidentiary constraints as you, and I think Professor Guha-Sapir, have put it?

Mr. SENOGLES: It is. It is part of the mix. Yes, it is.

Mr. SANDS: One final area. Obviously, we don't have time to go through all the areas you've addressed in the limited 30 minutes. But just, the matter of sexual crimes: you've come up with a figure for each act of rape, a compensatory amount of US\$5,000. That is lower, significantly lower than what the Democratic Republic of Congo has come up with, what human rights courts in the Americas and Africa have come up with.

I just wonder whether you are entirely comfortable with that figure, particularly having regard to the optics of what that might say about the gravity of the crime of rape?

Mr. SENOGLES: I'm grateful to you, Professor Sands, for the question. I think it's a fair question. I'm a human being. I'm a husband. I'm a father. I have, you know, a daughter and a son. US\$5,000 to compensate for these words that we used "aggravated" and "simple" rape, two words that we're not comfortable with, clearly US\$5,000 is not in any way sufficient to compensate for such an act.

I'll be candid. I try to always be candid when I'm giving evidence to courts and tribunals. I took that figure for consistency to remain within the UNCC figures. That is the figure that the UNCC decided to award. I'm not entirely comfortable with it, but neither am I entirely comfortable with an award of US\$30,000 for the loss of a life in such circumstances. How can anyone be so.

Mr. SANDS: Thank you, Mr. Senogles. One final question, and that concerns both of your reports: do you have any objection to your reports being made public? Your testimony today is public.

Mr. SENOGLES: Personally speaking, Professor Sands, no, I have no objection. I would obviously have to speak with my three colleagues to find out whether they shared the view. I remember you asked Professor Guha-Sapir the same question. And, of course, it would be up to the Court. We are — if I can say — officers of the Court. We are experts of the Court.

Mr. SANDS: Mr. Senogles, I thank you for being so succinct and clear and precise. We are bang on 30 minutes by my reckoning. I am deeply grateful to you. So thank you very much.

Mr. SENOGLES: 20 years in Switzerland has an impact, Professor Sands. Thank you.

Mr. SANDS: Thank you. Madam President, that ends our questions for Mr. Senogles.

The PRESIDENT: Thank you, Professor Sands. I now give the floor to Professor Sean Murphy to put questions to Mr. Senogles on behalf of Uganda. You have the floor, Professor Murphy.

Mr. MURPHY: Thank you, Madam President. Hello, Mr. Senogles. I am Sean Murphy. I am counsel for Uganda. As was the case with Mr. Sands, we only have 30 minutes so I too would appreciate relatively brief answers if they're at all possible.

Mr. SENOGLES: Good afternoon, Professor Murphy. Nice to meet you. I will try and also be concise with you. Thank you.

Mr. MURPHY: Thank you so much. Good afternoon to you, and good morning to me. I have to say; I am in Washington, DC.

In any event, let's start with the part of your report that deals with the appropriate amount of compensation for loss of life. Is it correct that the Court only asked you to look at the prevailing practice in the DRC and not at other sources?

Mr. SENOGLES: Correct.

Mr. MURPHY: And is it correct that in reviewing the evidence in the record before this Court regarding Congolese law and Congolese court cases, you are not able to find support for the fixed-sum amounts claimed by the DRC for each death?

Mr. SENOGLES: That is also correct. As I made an answer to Professor Sands, I believe it's two court reports that have been provided. Whereas, the DRC asserts that the US\$34,000 figure is an average of many court decisions. The evidence in the file that I have seen, as I mentioned to Professor Sands, does not really allow that figure of US\$34,000 to stand *up out*.

Mr. MURPHY: Is it also correct that you did not conduct your own research on the prevailing practice in the DRC in this regard?

Mr. SENOGLES: Correct.

Mr. MURPHY: And is it correct that in your report of December 2020 and your response of March 2021, you did not analyse the reparations orders issued by the International Criminal Court, including their discussion of the types of evidence presented by victims and their analysis of the appropriate compensation level for deaths?

Mr. SENOGLES: The International Criminal Court? That's correct, I did not analyse any papers from the ICC.

Mr. MURPHY: Instead of focusing on the DRC, as Mr. Sands indicated, you focused on your views regarding the United Nations Compensation Commission. And in that regard, you pointed to Category C. Is it correct that, as a general matter, the UNCC established Category C so as to allow claimants to file claims for their actual and proven amount of loss, which depending on the evidence presented could be in an amount ranging up to US\$100,000?

Mr. SENOGLES: I think that's correct. Again, let me just go back. I joined the UNCC in 2000. These claims in Panels A, B and C were seen to be expedited. They were seen to be more humanitarian in nature. So evidence was required but of a reduced standard, a reduced level.

Mr. MURPHY: So staying with Category C, is it true that the UNCC awarded the ceiling amounts that you're referring to for mental pain and anguish only to claimants who demonstrated certain modifying factors?

Mr. SENOGLES: I'll be honest with you, I don't really know. I don't really know the answer to that question. I remain candid.

Mr. MURPHY: Okay. Thank you for that. It's much appreciated. In contrast to Category C, is it correct that the UNCC established Category B so as to allow claimants to present simple documentation and thereby receive fixed amounts of compensation rather than actual amounts of compensation for personal injury or death, such as death of a spouse?

Mr. SENOGLES: I think that's correct, yes. And again, within Kuwait, because I've spent many, many visits in Kuwait over the years, there was a recognized breakdown of civil order after 2 August 1990 because of the Iraqi occupation. And, therefore, again, the institutional structures were disrupted, shall I say. Therefore, in a way it goes back to what Dr. Guha-Sapir said on Friday. The UNCC, which interestingly is referred to in the EECC damages report, is an example of an international claims commission in which normal — if I can say — normal evidentiary standards are relaxed somewhat to take into account the reality faced by the claimants in the jurisdiction at the time.

Mr. MURPHY: Okay. And so in the situation where it's difficult to gather evidence, the Commission, UNCC, set up Category B for claimants to provide simple documentation. And within that Category B — or let me ask you this: is it correct that in your response of March 2021 you said that given the limited documentary evidence by the DRC in this case, there may exist a reasonable basis for the Court to award US\$10,000 for a deliberate death, because that would be in line with the lower evidentiary standards of the UNCC under its Category B?

Mr. SENOGLES: For the benefit of the Court, you're referring to paragraph 76 of my response of 1 March. Professor Murphy, yes, I did say that. This is a decision clearly for the Court. I am giving my recommendations. I think the Court will be very well aware that this is partly a results-based analysis that I'm giving here. I'm not hiding behind anything here. I think ultimately the UNCC is a useful reference guide, which has a level of granularity, a level of choice — if I can be as brash as that and slightly crass, I think — but it provides a level of choice of precedents that will be useful to this Court to decide upon which if any, they regard to be helpful in their own deliberations, be that US\$10,000, be that US\$30,000, or indeed be that some other figure which they may be able to find from other claims commissions, unfortunately not including the EECC.

Mr. MURPHY: And so if the Court was to conclude that Category B was the more relevant reference point, if you will, because of the lack of evidence presented by the DRC, *is* it correct that, within that Category B, there was a fixed sum amount of US\$2,500 that might be awarded to an individual in a situation where a spouse, child, or parent was killed, and there was a maximum amount

of US\$10,000 which might be awarded to an entire family unit in the event of such a death? Is that correct?

Mr. SENOGLES: That's correct. I will have to refresh my memory on whether — I think that is correct. I'm just looking.

Mr. MURPHY: It would be UNCC Decision 1, paragraphs 12 to 13 if you were thinking about the original decision.

Mr. SENOGLES: Yes.

Mr. MURPHY: So I'm curious about your choice of the US\$10,000 maximum amount for a family unit rather than the US\$2,500 fixed amount for an individual who lost a family member. And if I can, maybe I'll lay this out in a simple hypothetical where we have a husband and a wife who are killed, and there is a surviving child.

If UNCC Category B were used, this would result in a total compensation of US\$5,000 to the child, US\$2,500 for the loss of the father, US\$2,500 for the loss of the mother; is that correct?

Mr. SENOGLES: I believe that to be correct, yes.

Mr. MURPHY: But under your approach, it would result in US\$20,000 in compensation, because we would have two persons killed for US\$10,000 each; is that correct?

Mr. SENOGLES: That is correct. And I think this comes back to an issue that Professor Sands raised right at the start of this: judgment. What I'm not saying to the Court today, Madam President, is that the UNCC is, as I've said before, is the benchmark. I'm a former UNCC staff member. I'm naturally going to tend towards that precedent, because I lived it and breathed it for many years. Again, to be specific. Not the personal losses. But I believe that US\$2,500 for a life is — is an unrealistic, is an unreasonable amount of compensation. And, therefore, I would be of the opinion that, as I say in paragraph 77 of my response 1 March, I am still of the opinion that US\$30,000 is more appropriate than either US\$10,000 or US\$2,500.

Mr. MURPHY: I understand. But if we're using the UNCC as a benchmark, you would accept that in Category B for the loss of life, US\$2,500 was the fixed sum amount awarded based on presentation of simple documentation?

Mr. SENOGLES: Agreed.

Mr. MURPHY: Every claimant in Category B was required to prove the fact of a person's death; is that correct?

Mr. SENOGLES: I believe that to be correct. What I'm not so sure about is how that proof was — so, the form of that proof, in terms of, specifically, whether an official death certificate was required. Because, like I say, the institutions were disrupted; nothing was working. There was some evidentiary requirement, yes. But a very much lower requirement than there was in other instances.

Mr. MURPHY: If we read the seven panel reports for the seven instalments relating to Category C, and if we read the three panel reports for the three instalments with respect to Category B, we would probably see an indication of the evidence needed to prove the fact of a death, wouldn't we?

Mr. SENOGLES: We would.

Mr. MURPHY: And every claimant was required to prove the family relationship with the deceased; is that correct?

Mr. SENOGLES: As far as I know, yes.

Mr. MURPHY: And every claimant was required to prove causation, meaning the link between the death and the invasion and occupation of Kuwait by Iraq; is that correct?

Mr. SENOGLES: Madam President, I'll be honest with you, I don't know. That steps into attribution. It's, as I — like I say, as a mere accountant it's not an issue that I ever go anywhere near, and indeed we didn't when I was on staff at the UNCC. I really don't know the level of proof — of

documentary proof that was required to provide a nexus between the individual's death and an act or omission of Iraqi military forces.

Mr. MURPHY: But you have been making statements about the nature of evidence that could be collected in Kuwait and in the DRC. Is that correct?

Mr. SENOGLES: Could you refresh me on that?

Mr. MURPHY: Well, I think in response to several questions of Mr. Sands you talked about the difficulty of gathering evidence in the DRC, for example.

Mr. SENOGLES: Oh, yes. Absolutely, yes.

Mr. MURPHY: Well, let me take you to a slightly different issue. Let's move away from the UNCC. You referred to the Eritrea-Ethiopia Claims Commission in your responses to Mr. Sands and you also referred to it in your response to the Court, of March of this year. Is it the case that you do view the work of that Commission as pertinent to this case?

Mr. SENOGLES: I think it's very interesting for the Court to have regard to that final damages award of 17 August 2009. I think there are many fascinating and, quite frankly, quite candid commentaries within that report that, I would suggest, may be of extreme interest to the Members of this Court in terms of the evidentiary requirements, the level of — they use the word “guesswork” — that is occasionally required, and I think the overall — the fact that they adopt evidentiary discounts, 25 per cent, 50 per cent.

So I think it's an extremely interesting report *of on* damages. Is it pertinent to the case before this Court? Yes, I think it is pertinent. I think the UNCC pertinent also.

Mr. MURPHY: Is it pertinent perhaps because the Eritrea-Ethiopia Claims Commission was addressing an armed conflict involving two African States in which one State occupied the territory of another State in the period of 1998 to 2000, which at some level seems similar to our case? Would you agree with that?

Mr. SENOGLES: I would absolutely agree with you, Professor Murphy. Yes, absolutely.

Mr. MURPHY: And are you aware of the evidence that was produced by the parties to the Commission with respect to, for example, the issue of death? Are you aware of all the evidence that was presented?

Mr. SENOGLES: I'm not, but they do talk about some . . .

Mr. MURPHY: Well, for example, are you aware that the parties presented fact and expert witnesses at the oral hearings?

Mr. SENOGLES: No, I wasn't. I wasn't aware of that.

Mr. MURPHY: Are you aware that those fact witnesses included, for example, victims of violence, including shootings, rape and bombings?

Mr. SENOGLES: Similarly, no.

Mr. MURPHY: Are you aware that the evidence included testimony by military personnel of both parties?

Mr. SENOGLES: I will answer consistently: no.

Mr. MURPHY: Are you aware that signed declarations were submitted to the Commission describing the acts of deaths that occurred?

Mr. SENOGLES: No, no, but those sound, Professor Murphy, if I may comment, again . . . I am the Court's expert here, I am no party's expert: that sounds collectively as if useful information and useful evidence that was gathered and put before the EECC. Yes, sounds good.

Mr. MURPHY: Are you aware of how much that Ethiopia and Eritrea sought in compensation for each civilian death before the Eritrea-Ethiopia Claims Commission?

Mr. SENOGLES: No.

Mr. MURPHY: So you're not aware that Ethiopia sought approximately US\$5,000 per civilian death?

Mr. SENOGLES: No.

Mr. MURPHY: Let me turn to the portion of your report that deals with recommended amounts for property damage. Can you confirm that, with respect to the DRC's property claims, you're not taking any position on what property loss is attributable to Uganda or for which Uganda is responsible?

Mr. SENOGLES: Two comments on that, Madam President. I am not taking positions. I am an expert witness. And I make absolutely no comment or certainly no opinion when it comes to attribution.

Mr. MURPHY: So when you recommend an amount relating to property loss, say in Kisangani, you're not saying that Uganda caused that property loss; you're just asserting that you believe that the amount of property loss that occurred in Kisangani during a certain period, happened; is that correct?

Mr. SENOGLES: I think that's correct. But to nuance it, my recommendations for the Court to consider — which, of course, to repeat myself, are absolutely for the Court to consider and to ignore or to adopt or to do anything in between those two extremes at the Court's discretion — my analysis is based upon the evidence that I have seen within the claim file.

Mr. MURPHY: Okay. Well, let's turn then to the evidence in the claim file that you reviewed. I'll direct you, first, to paragraph 86 of your response of 1 March 2021 and also to footnote 45, which is associated with paragraph 86.

You say there that if the Court finds that a claim is not supported to any extent, meaning — and this is more in the footnote — if the claim narrative, in conjunction with the supporting evidence provided, is utterly insufficient, defective, unconvincing or similarly unsatisfactory — then the Court might reach a finding which would result in no compensation being awarded; is that correct?

Mr. SENOGLES: It's correct. Except in my paragraph 45, I did not use the word "insufficient". But the guts of what you say, Professor Murphy, is. Absolutely. My recommendation to the Court is: I've suggested, humbly, this evidentiary discount factor methodology to the Court,

which was also used by the EECC which I regard is: it's standard practice, it's quite routine practice, it's very flexible practice. So, absolutely, Professor Murphy. If the Court finds that the evidence provided to the Court has zero probative value, then absolutely it follows that I would recommend to the Court that they should consider awarding zero in compensation.

Mr. MURPHY: Very good. So let's review some of your statements about the quality of the supporting evidence produced by the DRC relating to property loss.

In the experts' report at paragraph 149, you said that replacement cost figures for houses provided by the DRC are not evidenced nor explained; is that correct?

Mr. SENOGLES: I see it in front of me. That's correct.

Mr. MURPHY: And at paragraph 156, you said that the estimates provided by the DRC for the loss of certain infrastructure, specifically clinics and administrative buildings, are subject to uncertainties due to the absence of detail or evidence in respect of each individual property; is that correct?

Mr. SENOGLES: That's also correct. Can I just, as a matter of emphasis, before Professor Murphy moves on paragraph 149, which we've just discussed, the replacement cost figures: US\$300, US\$5,000, and US\$10,000. To give the Court a more full encapsulation, in my view, because the overwhelming majority of the structures — *les habitations légères, les habitations moyennes* — the overwhelming majority of *habitations légères*, so basic structures, the replacement costs are claimed at US\$300, which I regard to be a not-unreasonable figure.

And based upon the very useful photograph that was presented by the Democratic Republic of the Congo last week of the three types of structures, I think it's reasonable for the Court to allow an amount of US\$300 to replace such structures, even without evidence that one would normally expect as a replacement cost of a family home. Sorry, Professor Murphy. I just needed to clarify that.

Mr. MURPHY: Well, thank you, Mr. Senogles. But again your report says that if there is no evidence, then the Court should not be awarding compensation; is that correct?

Mr. SENOGLES: That's correct. But, Madam President, I think I need to nuance this. What Professor Murphy has said is correct, and I have said that. But I think that there are two steps where a court should be looking at what evidence is in the file needs to be assessed but also what evidence the Court should reasonably expect to be in the file. And, therefore, that second step is important because I think the Court needs to have regard to the prevailing circumstances of the claimant at the time.

Mr. MURPHY: Okay. Thank you, Mr. Senogles. So I was going to take you through the various paragraphs of your report where you basically say there's no evidence for looting infrastructure. I won't do that given the lack of time. I'm running out of time.

Mr. SENOGLES: But can I just help you here, Professor Murphy? Can I just help you here, just briefly? There are many instances where the evidence is, I regard, deficient. I agree with you.

Mr. MURPHY: Understood. Despite those problems, you then invoke in the report something that you call an evidentiary discount factor which you use to reduce by certain percentages the amount claimed by the DRC for the loss of property under different headings.

So, for example, you reduce the amount claimed for infrastructure by 25 per cent, or you reduce the amount claimed for looting by 50 per cent. That's the basic approach. Is that correct?

Mr. SENOGLES: Correct.

Mr. MURPHY: And faced with criticism of that approach by both Parties, at paragraph 82 of your response, you said that the Eritrea-Ethiopia Claims Commission used this approach, and I think you said that even earlier today, so as to cure evidentiary gaps when arriving at the awards; is that correct?

Mr. SENOGLES: Correct.

Mr. MURPHY: So let's look at . . .

Mr. SENOGLES: I then go on to quote five sequential paragraphs from the EECC final damages award, which does exactly as you've just said.

Mr. MURPHY: Yes. And, unfortunately, I don't have time to go through all five of those paragraphs, but why don't we take the very first paragraph that you've quoted from the EECC. In the *chapeau* of your paragraph 82 you say these are percentage-based evidentiary adjustments made by the EECC, and then in this first example you're quoting paragraph 144 of the Commission's final award on damages; correct?

Mr. SENOGLES: Correct.

Mr. MURPHY: ~~It~~ *And* the final sentence of paragraph 144 indicates a percentage of 75 per cent. Is it your interpretation that the Commission was reducing the total amount of compensation claimed by Ethiopia by 25 per cent, due to insufficient evidence presented by Ethiopia?

Mr. SENOGLES: That is what I'm saying. That's my understanding. I stand to be corrected, but that's my understanding of the consequence, of the methodology adopted by the EECC in these example five sequential paragraphs. They're all pretty consistent. They talk about the claim amount, they talk about deficiencies in evidence, and then they conclude by saying the Commission awards 50 per cent, 25 per cent, 75 per cent, etc.

Mr. MURPHY: Okay. So let me just see if I can probe your interpretation a little bit. You're aware that Zalambessa was a specific town — is a specific town and a specific place; is that correct?

Mr. SENOGLES: I would have to, yes. Yes. I haven't heard of the town. I will be completely straight.

Mr. MURPHY: Okay. Are you aware of the evidence that was presented by Ethiopia relating to the destruction of Zalambessa, such as an engineering study that was produced by the Tigray Works and Development Bureau which the Commission found especially probative as to valuation?

Mr. SENOGLES: I'm trying to see. As noted, a senior Ethiopian public works official projects that the actual costs of reconstruction . . . So some of the evidence is described in this single

paragraph. As to the detail of the other evidence, Professor Murphy, no, I am not aware. Clearly, I'm not aware.

Mr. MURPHY: So you read this paragraph, but you didn't read paragraph 139 that came five paragraphs earlier talking about the engineering report that the Commission found especially probative regarding valuation?

Mr. SENOGLES: Maybe I did, maybe I didn't. I did read sections of this Commission's report. And of course, I didn't want to lift and quote too many paragraphs, therefore, to overload this Court.

Mr. MURPHY: Well, are you aware that in addition to that survey, evidence was submitted showing actual reconstruction costs of some of the buildings?

Mr. SENOGLES: No.

Mr. MURPHY: Are you aware that the engineering survey did a building-by-building assessment of damaged structures?

Mr. SENOGLES: No, I am not. I think the methodology that is critical for the tribunal here is a demonstration of the EECC applying an evidentiary discount factor which, after all, the purpose of such a discount factor is to allow the Court a methodology to take into account the risk of overstatement. That is the purpose of it.

So, in this case and in these four other cases, the EECC had regard to evidence of variable quality. The evidence that Professor Murphy has just described sounds reasonably good evidence. But the EECC, nevertheless, found that they regarded the evidence needed to be discounted, or, sorry, the compensation amount needed to be discounted from the claim amount.

Mr. MURPHY: My last question, Mr. Senogles: would it be fair to say that your use of these evidentiary discount factors is driven less by actual evidence of actual properties and actual property replacement costs and more by a sense from your broader experience as to what compensation seems right or good in this particular context?

Mr. SENOGLES: I think you are portraying me as quite an artful person here, Professor, and I promise you I am not. No, I think it is a mix. I think the reality is, a claims assessor — someone with experience like me, all over the place, doing all kinds of stuff — I have looked at the evidence in this file. There are gaps in it. Some gaps, and I have said in my reports, I think the DRC really could have done better. They could reasonably have provided better and more evidence. But it is not just the volume of evidence. It is the nature of evidence. It is how contemporaneous evidence is, who prepares the evidence, what format it is in. So, it is not just a case of, sort of, what I believe the value of a property is. It is more a case of looking at the probative value of the evidence and what reasonably could have been expected to be produced by a claimant.

Mr. MURPHY: Thank you very much, Mr. Senogles. I appreciate very much your appearance here today. Madam President, that concludes the questions from Uganda for Mr. Senogles.

The PRESIDENT: Thank you, Professor Murphy. Let me take a look now and see whether there are questions from the judges. So, I am not seeing any from those present in the Great Hall, nor do I see any requests from those who are joining remotely. So, in that case, that brings us to the end of the questioning of Mr. Senogles.

We thank you very much, Mr. Senogles, for appearing before us. You may now sign out of the WebEx platform and continue to follow the rest of the hearing via webstream, if that is what you choose to do. The Court will now observe a 10-minute break, after which it will resume for the questioning of Mr. Nest. The Court now rises.

The Court adjourned from 4.05 to 4.20 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. The Parties and the Court will now have an opportunity to put questions to Mr. Michael Nest. I see that Mr. Nest has joined the meeting by video link. Good afternoon, Mr. Nest. I call upon you to make the solemn declaration for experts as set down in Article 64, subparagraph (b), of the Rules of Court.

Mr. NEST: I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth, and nothing but the truth, and that my statement will be in accordance with my sincere belief.

The PRESIDENT: Thank you. I now give the floor to Professor Nicolas Angelet to put questions to Mr. Nest on behalf of the Democratic Republic of the Congo. You have the floor, Sir.

Professor, I just want to explain to you that I cannot hear you at all. Professor, are you able to unmute your microphone, please? Mr. Nest, are you able to hear me?

Mr. NEST: I can hear you, but I cannot hear Professor Angelet.

The PRESIDENT: Thank you. Could somebody on the technical side please be in touch with the Professor to assist him?

Mr. ANGELET: Can you hear me now, Madam President?

The PRESIDENT: Yes, now we can hear you. Please proceed. You should be aware that from the beginning I was not able to hear you, so you should start from the beginning, please.

Mr. ANGELET: I do apologize. I had the headphone, as instructed by the technical service. However, it seems not to work, so I will use the audio on my computer, and I assume that everybody can hear me. Dr. Nest, can you hear me?

Mr. NEST: Yes.

Mr. ANGELET: Thank you, my apologies. So, Dr. Nest, you have attended the previous conversations with the experts, so you are aware that we have 30 minutes, and that therefore we kindly ask you to answer the questions as succinctly as possible. And also, as you are aware, we have interpreters, so I may kindly ask you to answer with “yes”, “no”, to speak out and not to nod, because that will be lost in the translation; right?

So I understand that you hold a doctoral degree in politics, and that your PhD focused on how mining interests shaped politics in the DRC during the war from 1998 to 2003; is that correct?

Mr. NEST: The focus started a little earlier than the conflict, but it included that conflict period, yes.

Mr. ANGELET: Thank you. So we very much value your expertise in this respect, and I should say also on the political and social economic aspects of war economy. That is, in fact, one of your four expertise; right?

Mr. NEST: Correct.

Mr. ANGELET: Thank you. So I have already mentioned at the end of the first round of oral pleadings that there are a number of issues on which we agree with you. We have learned a lot, I must say, from your reports. And, for example, the World Gold Council data on gold prices that you have used, which we did not use, we accept your viewpoint in this matter and therefore this requires no further discussion. But there are a few points on which we would like to revert, and due to time constraints we will concentrate on gold and timber.

Just before I start, one last point, perhaps. I will give references to paragraphs or pages, which is essentially for the benefit of the Court or, in fact, for the transcripts. So you don't need to revert every time to your documents to follow the documents as we discuss the issues, you can just listen and, of course, consult your own documents if you specifically wish to do so.

Let me start with first gold production. My first point is concerned with your estimates of the production of gold in the DRC and in the area of Ugandan influence, that is, so, the source of the war economy. In your report, you have identified national production and production in the area of Ugandan influence by combining official production and informal artisanal production, right, as shown in table A4.5.1 in your report; is that correct? So you have both these elements?

Mr. NEST: Correct.

Mr. ANGELET: Thank you. So overall, official production is much lower in the DRC than informal artisanal production over the war period?

Mr. NEST: Yes.

Mr. ANGELET: Official production accounts in your table for slightly more than 17,000 kg, while artisanal production accounts for 24,000 kg; right?

Mr. NEST: Yes, I take your word for that. I'm looking at my table, yes.

Mr. ANGELET: So informal artisanal production is necessarily an estimate; right? It is informal, so we have no statistics, so it is a matter of deduction; is that correct?

Mr. NEST: Not exactly. We do not have comprehensive data because the nature of it is that it is informal and people typically try to hide what they are doing, but there are observations and cases where production quantities and prices have been estimated by knowledgeable individuals as reported in various listed references.

Mr. ANGELET: Absolutely. Indeed. And this leads me to the estimation method in paragraph 234 of your report, where you start from a study by Mthembu-Salter, who give an estimate of a yearly artisanal production in the mid-2010s of 15 metric tonnes, 15,000 kg. And then you reduce that by two thirds to reflect the fact that artisanal production grew significantly after 2003. Right?

And you state then that the resulting estimates of 5,000 kg a year— which will be in your tables ultimately — 5,000 kg a year is in keeping with the lower end of a Human Rights Watch estimate, the lower end of that estimate, which is of 1,000 to 3,000 kg of gold leaving the Mongbwalu area each month in 2004.

So that's a very interesting comparison. Which means, I understand, that the reduction that you operate on, the estimate by Mthembu-Salter, which is a reduction by two thirds, from 15,000 to 5,000, is in line with the estimate by Human Rights Watch of 1,000 kg leaving the Mongbwalu area.

And now here is my question. Given that the Human Rights Watch's estimate is of 1,000 to 3,000, is it also correct that an average, the median, of the Human Rights Watch estimate, that is, 2,000 kg leaving Mongbwalu area would therefore be in line with 10,000 of artisanal production; is that correct?

Mr. NEST: No. So, Madam President, in preparation for today, I checked the original HRW reference on page 55. So, in fact, the original reference should be artisanal production -- should be an estimate of 20 to 60 kg of gold leaving the Mongbwalu area each month in 2004.

What I have done, I have multiplied that to create an annual figure. So, in fact, in paragraph 234 of my March 2021 report, the correct phrasing of that sentence should be an estimate of 1,000 to 3,000 kg of gold leaving the Mongbwalu area each year in 2004. So, in that sense, the lower estimate of a thousand is approximately in keeping within Mthembu-Salter's estimate.

Mr. ANGELET: Exactly. Okay. So, but you have that range, which is on a monthly basis or a yearly basis, but what you do say is that 1,000 from Human Rights Watch corresponds to 5,000 in Mthembu-Salter; correct?

Mr. NEST: It doesn't correspond to it. But if Mongbwalu is a single source of informal gold production, and the estimate is 5,000 kg for the entire country, *and* we know that Mongbwalu is a very important source of gold, that my lower end of about a thousand kilos is probably reasonable as a conservative estimate of how much of that national artisanal total during that time-period came from Mongbwalu. But HRW does give a range from 1,000 to 3,000.

Mr. ANGELET: Thank you. But here, the purpose of that comparison is not to determine how much came from Mongbwalu; right? What you were doing was to estimate the national artisanal production during the war on the basis of the study by Mthembu-Salter.

Mr. NEST: Correct.

Mr. ANGELET: And that study was of 15,000. And then you reduced it by two thirds because, as you say, there is information that production rose after the war; correct?

Mr. NEST: Correct.

Mr. ANGELET: And, so you want to make a deduction. And the deduction by two thirds from 15,000 in Mthembu-Salter to your estimate of 5,000 in the war, you say that is in line with the lower

end of the information from Human Rights Watch, and the lower end is 1,000 for an estimate by Human Rights Watch of 1,000 to higher end 3,000; right?

Mr. NEST: Correct.

Mr. ANGELET: And so my question is only: knowing that we are seeking to identify artisanal production on the basis of comparisons and estimates, if we now take the average of Human Rights Watch estimates, which is between 1 and 3, so if we say the average, the median, is 2, then that would correspond to more than 5,000 at the national level; right?

Mr. NEST: Not necessarily. It would depend on what proportion of production is likely to have come from Mongbwalu.

If approximately 20 per cent came from Mongbwalu, that would fit in with an estimate of about a thousand. If 40 per cent came from Mongbwalu, then that would also fit in with 5,000. So, there are actually two issues here: one is about the proportion that Mongbwalu represents — which we are not sure about, *and* cannot be completely sure about — and then also Mthembu-Salter's estimate, which I have reduced to 5,000.

Mr. ANGELET: Thank you. Okay. So, let's move to the exports. It is stated in paragraphs 228, 229, 230 of your report that you also based your estimates of DRC production of minerals on exports of those same minerals by Uganda, exactly. More specifically, exports by Uganda that could not be explained otherwise, notably by Ugandan local production.

Mr. NEST: Yes.

Mr. ANGELET: Now as concerns gold. This is reflected in Table A4513, which is at page 113 of your report, and that comprises formal exports, formal domestic production and an estimate of artisanal production. And footnote D to that table discusses other possible sources of Ugandan exports. And I see that you probably have it before you now. It states the reasons why you consider that Ugandan exports in excess of domestic production must be assumed to be — to originate in the Ugandan area of influence; right?

And, that is, cross-border trade in gold between Uganda and either Rwanda or Burundi were unlikely. Kenya produced and exported gold, but there was no reason for traders to bring DRC gold to export from Kenya, if possible, I quote, “from Uganda”, but I presume that this should be “from DRC”. And then anyway, you continue: “Central African Republic production unlikely to have transited through the DRC to Uganda; and Sudanese production unlikely to have been exported via Uganda”.

So, my question is, do I correctly understand that this means that there is no indication or no reason to believe that part of the Ugandan exports, in fact, originated in these other neighbouring countries? That is the point that you make; right?

Mr. NEST: Well, let me clarify a couple of things. First, I think, Madam President, in my March 2021 report, I updated the tables for gold from my December 2020 report. I understand, Professor Angelet, that you have just quoted the table given the page number from the December report, and not the table from the March 2021 report, which is on page 56. But, nevertheless, the note is the same. The footnote is the same.

Mr. ANGELET: Okay, thank you. That’s my point, yes.

Mr. NEST: So, in regard to “no reason for traders to bring DRC gold to export from Kenya, if possible, from Uganda”. No, in fact, I did mean from Uganda. So what I meant is that if you obtained gold in the DRC and you could get it into Uganda, you would most likely export it to the international market, typically that meant Dubai or Mumbai, from Uganda rather than continue on with it to Kenya.

Mr. ANGELET: Okay.

Mr. NEST: To clarify that issue.

Mr. ANGELET: Thank you. But overall, this means, I think this confirms that your position is that there is no indication that exports by Uganda originated in countries, neighbouring countries other than the DRC during the war; right? It didn’t come from Sudan, it didn’t come from the Central African Republic, it didn’t come from Rwanda, Burundi?

Mr. NEST: Yes, I think that would be unlikely.

Mr. ANGELET: Thank you. That was my question. Thank you, that's very useful. Just a small question in that respect. Could there also be informal Ugandan exports?

Mr. NEST: Yes, and I address that in my report. Yes. So, ~~that~~ there is both informal Ugandan production, and I agree that some of that production, and possibly formal production as well, was most likely informally exported and probably not captured in Ugandan export data.

Mr. ANGELET: Thank you very much. I move to valuation, and here I have probably two questions for you. I would like to discuss the discount you apply to the world market price. And then, if I understand well, the discount is related to your description of the value chain; right?

Mr. NEST: Yes.

Mr. ANGELET: Which I have found very interesting indeed. And so if we look at a discount percentage, which you set at 35 per cent; right? We will come to that. In your responses, Dr. Nest, at paragraph 109.3, you explain — and that is basic but still I discovered it when reading your document — that the domestic value of resource at local level is always less than the international market price. If not, there would be no export market.

Now, I understand that this means that the DRC, leaving aside all the issues of value chains within the DRC, the DRC cannot claim damages on the basis of the world market price, as it did in the Memorial, because some parts of the market value of the minerals would have been generated outside of the DRC in any event; right? There is always an export market and some part of the value is on the DRC gold would be generated in — with intermediaries — in Uganda or in London or in Switzerland or whatever; is that correct?

Mr. NEST: Including intermediaries within the DRC itself.

Mr. ANGELET: Absolutely.

Mr. NEST: Yes. That is correct.

Mr. ANGELET: Yes. But even if there were no intermediaries in the DRC, there would still be some parts abroad. So I do understand that.

Then this brings me to the discount percentage. At paragraph 109 of your responses, 109 (1), that is, you stated that the discounted price likely varied from one resource to another — gold, timber, diamonds, etc. And you explained that you had used a single percentage for all the resources, because it was methodologically simpler. And in order to have a conservative discount rate to improve confidence that any estimate of the value was, at a minimum, reasonable. That is what you did; right?

Mr. NEST: Yes.

Mr. ANGELET: Now, you applied a discount rate of 35 per cent — and I would like to make sure that this is a correct one for gold, because, of course, I fully understand your methodological and time constraints, but gold accounts for a very large part of the DRC claim, so we should have the right percentage for gold. Otherwise, there might be an enormous impact, a disproportionate impact on the overall valuation, I would say.

Mr. NEST: With respect, actually, I disagree with that comment. I don't think it was right on my part, as an independent expert, to predict the possible size of the damage in influencing the method that I used for each commodity. Where I thought that method was reasonable, *and* including that it was reasonable to apply across the commodities, I did so. I did not work out the discount thinking that there was so much money in gold and not, for example, in tungsten.

Mr. ANGELET: I fully understand that and that is perfectly fine. I am just saying, as counsel, I must make sure that the valuation reflects effective value and I would like to make sure that the discount rate is correct for gold.

Now, your report at paragraph 277 mentions one instance which is concerned with gold, and which I quote:

“Price comparison: HRW (2005), interviewing the leader of the Nationalist and Integrationist Front (FNI) in October 2003 ([that is] after the period relevant to this report), reported him calculating he would ‘make about \$50,000 from the sale of five kilograms of gold’”.

That is the quote from Human Rights Watch. And then you conclude: "This amount is only 20% less than world gold price for that month". Correct? My question is this: you compared the price mentioned by the FNI leader with the world market price in October 2003; that is, at the time of the interview. Right?

Mr. NEST: Yes.

Mr. ANGELET: At the time of the interview. And your report correctly reflects the content of the Human Rights Watch study, and my question is: is there evidence that the FNI leader was talking about gold sold in the month of October 2003, or was he rather referring in a broader manner to the gold sold in the preceding months? Was he not making a general statement, which you quoted? It is correct? He says he would make about US\$50,000 from the sale of 5 kg of gold. Do we know that he was talking about a sale in October?

Mr. NEST: Without seeing the original quote and the date of that quote, and without understanding whether the questioner pushed him on the specific period, or he mentioned it, we cannot be sure.

Mr. ANGELET: Thank you. I am asking because the statement is in a section of the Human Rights Watch report, which is entitled "Control of the Gold Mines". It starts at p. 51 with the statement that the FNI took control over Mongbwalu on 13 March 2003.

Now I call on your expertise on the evolution of gold prices. As you know, the gold prices were climbing rapidly at that time; right? In 2003, they start climbing. And I checked, on 24 March 2003, on your database of the World Gold Council, the price was of US\$10,592 per kilo and then climbed slowly. And if we take an average of US\$11,000 per kilo between March and October 2003, then in fact the FNI leader receives 90 per cent of the world market price. Can you see that?

Mr. NEST: Yes, but I would just point out that the closer you are to the exporting of gold, the less the difference between the price you receive and the international price. So if that leader is correct and he is talking about the last, let's say, three months of the time period that I was analysing, we do not know how many intermediaries there are between the FNI and the final buyer who paid the

international gold price, but let's assume that there are not so many intermediaries. But, nevertheless, on the other side of him — so I accept that they took control of a mine. They may also have been the producer and fully controlled production, and there may be only one intermediary between them, if any. But that is for one particular area. Yes, you are correct. Yes.

Mr. ANGELET: So, in fact, my point is only perhaps the FNI leader, in fact, was in the value chain at 90 per cent of the world market price rather than 80 per cent; right? And on the basis of the information available, we cannot exclude that. So thank you for that.

Mr. NEST: That's correct.

Mr. ANGELET: Thank you. And then we have the different value chains — that is probably my last point on gold — which is equally very interesting. Obviously, we have different types of value chains, as you just mentioned. But I would say a typical *modus operandi* that we have seen is that the Ugandan army controls access to the mine, allows private miners to enter the mine on the condition that they pay a tax in gold — in gold to the army; right? That is a typical *modus operandi*, as we have seen?

Mr. NEST: No, I don't think it's reasonable to say that is typical. Even if you're talking only about gold and not the other commodities, there were hundreds, possibly thousands, of sites where gold was produced, and we know that UPDF personnel were not present at all of those sites, although they may have been present, and were present, at some major producing sites. But I would hesitate to call that typical.

Mr. ANGELET: Okay, with "typical", perhaps that was erroneous phrasing on my part. That is one of the *modi operandi*. Not the prevailing one, but one of them, as we have seen in Watsa, etc. Now, my question is this: if we have a soldier at the entry of the mine, taking gold from the digger and bringing that directly to Kampala, either immediately or after a few months, but assume that the Ugandan soldier does not sell it to a private person in the Congo. He would bring it to Uganda, perhaps. Then there is no value chain in the Congo; is that correct?

Mr. NEST: If that was the way it was organized, then that would not necessarily be correct, because in fact there may be fees and taxes on different people associated with the mine, even before that Ugandan individual took control of the gold. But it is not clear from the literature that where gold mining was strongly influenced by the presence of Ugandan troops, that, in fact, they did receive gold and then immediately take it out of the country, as opposed to extract value locally in the form of some kind of tax, only to allow it to continue to flow through the existing supply chain, which may not necessarily have been controlled by Ugandans.

Mr. ANGELET: Absolutely. I can see that, yes. But there would then be two flows. One is the private flow of the person digging and keeping part of the gold, and then there is the other flow of the soldier receiving a tax in gold, which then likely he would not reintroduce in the local economy, or he could?

Mr. NEST: I think we cannot be sure. In some cases if the obtaining of gold exiting a mine is done systematically under a commanding officer, then it is possible that all of that gold may have been channelled directly away from the mine and into Uganda, or at least into a large trading or exporting house.

But if individuals — and I take this into account in my report — if individuals are actually keeping some of that gold or they are stealing it for themselves, they may well choose to sell it to a trader. So, therefore, it has entered into the hands of a member of the armed forces, but then the gold has re-entered the private supply chain. We know that there were these varieties, but it is difficult to know the distribution of quantities of gold across that variety of supply chains.

Mr. ANGELET: Thank you very much. I presume that my time is rapidly coming to an end, so let me just ask two small questions on timber. My first question on timber relates to the quantity of DRC timber export and on the ComTrade data that you have used. You have used data — this is a bit technical — for the commodity code HS 4407, and you have explained — that is at p. 127 of your report — that ComTrade did not provide data for other wood which should be assumed to also have left the DRC. So here we face the limits of the ComTrade data; right?

Now, we have also been searching this data and we have found a number of other categories of wood which I would like to submit to you, which were exported from the DRC between 1998 and 2003. And that is first code 4403, which is “wood in the rough”. Then we have code 4408, which is “veneer sheets”, and then 4409, “wood continuously shaped”. Do you agree or would you consider that some or all of these other categories should be added to the calculation of the timber quantity that was exported?

Mr. NEST: No. I came across that information and the FAO data on timber also includes five or six different categories of timber. The reason why I did not include them, and think they should not be included, is mostly because of the degree of processing that is required to get them into that stage where they fit ~~that~~ *those under* UN ComTrade codes.

The data you quoted from ComTrade was presumably collected by Kinshasa officials. I think it may be correct that wood exiting the DRC, probably through the Port of Matadi, may have had some processing and fit into those categories. But I think that wood exiting what I call the “Ugandan area of influence” into Uganda is very unlikely to have been processed beyond, perhaps, the minimal sawing of planks.

So you’ll see that the code I used emphasized sawn wood. Even though whole logs can be exported, they require very large trucks and reasonable roads, and we know that the road network was dilapidated, that few operators would risk having expensive trucks operating in Congo if they weren’t sure they could take ~~it~~ *the truck* out. But the kind of processing of logs into sawn wood and then the transiting of that wood, often *carried* on things as simple as bicycles or much simpler trucks or hand-carried into Uganda, I think is much more likely.

So I accept and understand that there are other category numbers for wood, but I think it is unlikely that much wood that fit those categories would have actually transited into Uganda, which is why I focused on sawn wood.

Mr. ANGELET: And also “wood in the rough”, which sounds like rougher, I mean, than . . .

Mr. NEST: Well, there you get into the question of the cost of processing. So Congolese labour was cheap, and any kind of processing that could be done *there in the DRC* as opposed to Uganda, if you were importing timber, you would do it in Congo if you could.

So I doubt that from the UAI you would export whole logs. Wood in the rough, perhaps you would. But I think if it was cheaper to actually process it into sawn wood, so that's basically very rough planks, then you would probably do that if you were an importer from Uganda, because you would want those costs incurred in the DRC, where they are lower, as opposed to in Uganda. I don't discount *that exports of wood in the rough* completely, but I think it is unlikely for the UAI trade.

Mr. ANGELET: Thank you very much. One last question, perhaps if I may, the price model that you have used for the purposes of the valuation of timber. In your report, you apply a discount of 35 per cent, right, to the price of the International Tropical Timber Organization (ITTO) and that is intended to better reflect probable price at points of opportunities for exploitation in the DRC.

Now, at the same time you acknowledge that there is a Baker price, you will recall. The Baker price is based on market rates in Burundi for timber of DRC origin. So this is the neighbouring country, right, an immediately relevant export market, and you acknowledge that the Baker price is higher on average than the ITTO price. So is it correct that the price model that you use seems, from that perspective, to be far below the average rate of DRC timber on a market like Burundi?

Mr. NEST: Well, first, on the Baker price. She actually assumes that the price within the DRC was 50 per cent of the Burundian price. So she halves it. I do a discount of 35 per cent, whereas she reduces it by 50 per cent. But if I look at my graph on page 90 of the December 2020 report under paragraph 397, my adopted price is higher than Baker's for 2002 and 2003. Hers is marginally higher than mine for 1998 and 1999, but there is a noticeable discrepancy for 2000 and 2001. On balance, given the other price reference points that were available to me, I decided that my adopted price was reasonable.

Mr. ANGELET: Thank you very much. I have no further questions. Thank you very much for your time and this discussion.

Madam President, thank you very much also for your patience and your time.

The PRESIDENT: Thank you, Professor Angelet. I now give the floor to Mr. Yuri Parkhomenko to put questions to Mr. Nest on behalf of Uganda. And Mr. Parkhomenko, the questioning on behalf of the Democratic Republic of Congo did run over by a little more than 5 minutes. So if you wish to extend your own questioning to 35 minutes, you're free to do so. Of course, if you wish to stick to 30 minutes, that's fine as well. So please go ahead, Mr. Parkhomenko.

Mr. PARKHOMENKO: Thank you very much, Madam President.

Good afternoon, Dr. Nest. It's our pleasure to see you with us, and I wish we could have an opportunity to meet together before the Court and I could have an honour to shake your hand before we start our discussion.

I have a couple of questions to discuss with you. And I would like to start with your approach to your methodology. Dr. Nest, in your response regarding exploitation of natural resources, you say that methods similar to those in the Nest report have been used in other cases, and you refer to two examples. One is from the Liberian Truth and Reconciliation Commission and another is from the United States Military Tribunal at Nuremberg; correct?

Mr. NEST: Correct.

Mr. PARKHOMENKO: And allow me take to you to your first example relating to the Liberian Truth and Reconciliation Commission. In paragraph 119.1 of your response, you say that this Commission supports your methodology; correct? I'm referring you to paragraph 119.1 of your response.

Mr. NEST: In fact, what I say is that it uses a similar method of estimation.

Mr. PARKHOMENKO: Right. Dr. Nest, are you aware that the Commission's task was to establish whether economic crimes occurred within the timber and mining industries, not to estimate the quantity and valuation of illegally exploited natural resources?

Mr. NEST: No.

Mr. PARKHOMENKO: So I refer you to paragraphs 1 and 6 of the Liberian Truth and Reconciliation Commission, where the Commission discusses its mandate with respect to natural resources, which was only to investigate economic crimes, such as the exploitation of natural or public resources, to perpetrate armed conflicts during the period of January 1979 to October 2003 in Liberia.

In any event, Dr. Nest, are you aware that the Commission had specific evidence clearly showing the amount and value of illegally exploited natural resources that were exported by the Oriental Trading Corporation?

Mr. NEST: Yes.

Mr. PARKHOMENKO: And the Commission had specific evidence showing that the Oriental Trading Corporation exported 26.6 million cubic metres of timber between 1999 and 2003; correct?

Mr. NEST: Yes, I forget the date range. But, yes, I remember that figure.

Mr. PARKHOMENKO: And the Commission also had specific evidence showing that the total value of the illegally exploited timber that the Oriental Trading Corporation exported was US\$597.5 million during the same period; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: And to establish the amount and value of the illegally exploited timber, the Commission relied on the Corporation's inventory spreadsheets of all logs that were shipped for the period of December 1999 and March 2003; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: So, Dr. Nest, would it be fair to say that if that Commission had been charged with estimating the quantity and valuation of illegally exploited natural resources, it had specific evidence with respect to the actor, the actor's conduct, the amount of illegally exploited natural resources, and the value of those resources?

Mr. NEST: In the Liberian case, yes, it did.

Mr. PARKHOMENKO: Thank you, Dr. Nest. In the formula that you use in Annex 4.5 of your report to estimate the amount of gold illegally exploited by Uganda, you assume that during 1998, 2003, Uganda's exports access to production originated from what you call the Ugandan area of influence in the DRC; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: Dr. Nest, does your report cite any specific evidence showing that Uganda's export of gold included gold that was illegally exploited by Uganda in the DRC?

Mr. NEST: My understanding is that the Ugandan customs doesn't collect information about whether the gold is being illegally exported, so they collect data on the quantity. So, therefore, my answer is no.

Mr. PARKHOMENKO: Thank you, Dr. Nest.

In the formula that you use to estimate the amount of coltan, tin, and tungsten illegally exploited, you assume that during 1998 to 2003, the difference between the domestic production and export originated from the Ugandan area of influence in the DRC; correct?

Mr. NEST: Correct.

Mr. PARKHOMENKO: And I have the same question, Dr. Nest. Does your report cite any specific evidence showing that Uganda's export of those minerals included coltan, tin, and tungsten that were illegally exploited by Uganda in the DRC?

Mr. NEST: My report refers to references, including the United Nations Panel of Experts reports, that talk about specific cases of — certainly coltan — transiting Uganda that . . . following questioning around the parties responsible for that export said that it was from the DRC. So I do not quote those cases directly, but I use references that discuss those cases.

Mr. PARKHOMENKO: Thank you, Dr. Nest. And are you aware that the Porter Commission, which also discussed and analysed the references mentioned in the United Nations Panel of Experts, for example, you referred to coltan, that the Porter Commission found that Uganda — that there was no evidence linking Uganda to those specific examples cited in the United Nations Panel of Experts dealing with the exploitation of coltan?

Mr. NEST: I think that is a mischaracterization of the Porter Commission's conclusion. The Porter Commission found, according to my understanding, that the Ugandan State did not have a policy and was not directly involved in that trade, but the examples that it referred to transited through Uganda. So in that sense, there was some Ugandan involvement but it wasn't directed by the Ugandan State.

Mr. PARKHOMENKO: Right. The Porter Commission refers only to the transit of coltan through Uganda, but the Porter Commission did not say anything about the illegally exploited coltan ending up being exported by Uganda; correct?

Mr. NEST: To be honest, I can't remember exactly where the Porter Commission concluded that coltan that transited through Uganda came from and whether it did come from the DRC. So I cannot recall that exactly. I would have to check the Porter Commission report.

Mr. PARKHOMENKO: Thank you, Dr. Nest. I would like to bring you to your second source that you cited as supporting your methodology, and in paragraph 119.2 of your response. You mentioned the US military tribunal at Nuremberg as a precedent that accepted approximate estimates; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: Dr. Nest, are you aware that the tribunal only had to establish criminal responsibility of a person for illegal exploitation of natural resources, not to estimate the quantity and valuation of illegally exploited natural resources?

Mr. NEST: I understood that that was the purpose. They were linking their estimates to the individual.

Mr. PARKHOMENKO: Thank you, Dr. Nest. The tribunal in that case relied on the testimony of a defence witness who had been the manager — the manager — of the Polish coal mines where illegal exploitation occurred; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: And, Dr. Nest, you also observe in your response that that defendant-witness gave detailed estimates for different mines presumably based on mine records; correct?

Mr. NEST: Correct.

Mr. PARKHOMENKO: In fact, the tribunal stated that this witness gave the highly significant testimony that it was taken from such coal mines in 1940, 62,000 tonnes of coal; in 1941, 62,400 tonnes of coal; in 1942, 69,300 tonnes of coal; in 1943, 74,800 tonnes of coal; and in 1944, 77,900 tonnes of coal; correct?

Mr. NEST: Yes, in fact, what is notable about the *Polish Coal Mine* case and the *Polish Forestry* case, but also the *Liberian Forestry* case, is that in all three cases, single entities were involved in the production and removal or exploitation and trade of that commodity over the international border. So that is very different to the DRC, where you have multiple parties involved and there weren't single entities who were actually in charge of extraction, trading and removal across international boundaries.

Mr. PARKHOMENKO: But it's also the case that another difference between the cases in those examples you cited and the cases here, is that all those cases involved very specific examples of evidence, both with respect to actors, both with respect to actors' conduct, and both with respect to the amount of the resources extracted and the valuation of those resources; isn't it correct?

Mr. NEST: No, I think it really depends on how you define “evidence”. For calculating exports, there are effectively two ways to do it. One is that you look at sources of production and what is consumed domestically, you subtract domestic consumption from production, and you assume that what is left over gets exported.

The other method is that you actually look at export data itself. If by “evidence” you mean data collected by the Ugandan Bureau of Statistics, for example, about gold, if that is seen to be evidence, then, in that case, I think we can say that it is, in fact, based on evidence, my approach.

Mr. PARKHOMENKO: Dr. Nest, but there is a difference between data collected by the Ugandan Bureau of Statistics, which deals generally with export of gold, and there is a difference with respect to exact data which shows a particular entity exported natural resources which were linked to a proven conduct of illegal exploitation of natural resources.

And if you allow me to bring you back to the discussion of the Nuremberg Tribunal, would it not be fair to say that the estimates, as were presented before that tribunal were reliable because those estimates were based on the testimony of a witness with really specific knowledge about the specific amounts of the resources, which were linked to the specific locations, of which he was a manager?

Mr. NEST: I think that it is correct that it is reliable. But at the same time, if export data had been collected on the Polish border of those quantities of timber and coal exiting Poland into Germany, then it would be reasonable to use that export data if it was seen to be collected by a reliable authority.

Mr. PARKHOMENKO: Right. Only if that data could be reasonably reliable, if that data could be linked to a particular conduct related to the illegal exploitation of natural resources, which brings me to the question on this issue that I wanted to discuss with you.

At page 111 of your report, you say that 75 per cent of production of gold to be in what you call “Ugandan area of influence” in June 2000, and then 70 per cent from July 2000; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: So these percentages, Dr. Nest, they do not appear in any of the sources you cite, do they?

Mr. NEST: No, they do not. That's correct. They are my estimates.

Mr. PARKHOMENKO: I also have the same question with respect to the 75 per cent. You say that 75 per cent of the DRC's export of gold to be in what you call "Ugandan area of influence" in June 2000 and then 70 per cent from July 2000; correct?

Mr. NEST: Correct. With that change occurring because of a change in control over Kisangani.

Mr. PARKHOMENKO: Right. Again, these percentages do not appear in any of the sources you cite; correct?

Mr. NEST: Correct. They are my estimates.

Mr. PARKHOMENKO: Dr. Nest, you also say that the difference between the production of gold from what you call "Ugandan area of influence" and export of gold from "Ugandan area of influence" reflects the amount of gold smuggled in "Ugandan area of influence"; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: Thank you. Dr. Nest, to estimate the total amount, the total value of natural resources allegedly exploited, you developed proxy taxes using assumptions about the methods of exploiting value; correct?

Mr. NEST: Correct.

Mr. PARKHOMENKO: And, for example, you developed such proxy taxes as fees and licences, and tax on value of sales and exports; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: In your report, you include Annex 4, which is entitled “Reported taxes on natural resources”, and list in that report information about the level of fees, licences and taxes; correct?

Mr. NEST: Correct.

Mr. PARKHOMENKO: You used the information from Annex 4 as the basis to develop the values of your recommended taxes; correct?

Mr. NEST: No, I didn't use them as the basis to develop my . . .

Mr. PARKHOMENKO: As a reference.

Mr. NEST: As a reference point.

Mr. PARKHOMENKO: As a reference. Yes.

Mr. NEST: As a guide.

Mr. PARKHOMENKO: As a guide. Thank you, Dr. Nest. You also say in paragraph 325.1 of your report that some periods mentioned in Annex 4 are outside of the relevant period, namely, August 1998 to end May 2003; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: And you also say at the same paragraph that many references are for areas outside the Ugandan area of influence; correct?

Mr. NEST: Yes. But I would just qualify that *comment* with saying that between August 1998 to March 1999, *the* RCD effectively governed the non-government-held territory. So that is correct for the UAI. But in that particular period *from August 1998 to March 1999*, it was all effectively administered as one, and whatever taxes were in place, let's say, in the Rwandan area of influence, were also in place in what became the Ugandan area of influence.

Mr. PARKHOMENKO: Thank you, Dr. Nest. You also say at paragraph 325.3 of your report that most of the tax collecting entities reported do not appear to directly involve UPDF; correct?

Mr. NEST: Correct.

Mr. PARKHOMENKO: Dr. Nest, coming to the question of the measure of damages. You state at paragraph 122.1 of your response that you explicitly used the discounted adopted price, which is 65 per cent of the international market price, to avoid valuing the quantum of production at the commercial value of the minerals on the open market; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: And you apply this same approach to other natural resources; correct?

Mr. NEST: Yes.

Mr. PARKHOMENKO: So, you agree that the commercial value of natural resources cannot be the measure of damages; correct?

Mr. NEST: Well, it depends at the point at which the commercial value is being defined. If you define it as the international market, I agree that that is correct.

Mr. PARKHOMENKO: That is what I mean, Dr. Nest. Thank you for the clarification. Today Professor Angelet referred you to the exchange involving the leader of FNI, who was boasting about selling gold at a specific price, at a specific time, and you emphasized that if that gold was sold at the opportunity which was closer to export, then do I understand you correctly that that value would not be the appropriate value to measure the damages?

Mr. NEST: Yes, that is a correct summary *of my position*.

Mr. PARKHOMENKO: Thank you very much. I have no further questions, Dr. Nest. I really appreciate your participation. Madam President, we have no further questions.

The PRESIDENT: Thank you, Mr. Parkhomenko. Let me see whether any judges have questions for Mr. Nest. I am seeing none in the Great Hall, and nor do I see any from the judges who are joining us remotely. So, that brings us to the end of the questioning of Mr. Nest.

We thank you very much, Mr. Nest, for appearing before us and for your work on the report. You may now sign out of the WebEx platform and continue to follow the remainder of the hearing through webstreaming if you choose.

The Court will meet again on Wednesday 28 April 2021, at 3 p.m., to hear the second round of oral argument of the Democratic Republic of the Congo, at the end of which the Agent of the Democratic Republic of the Congo will read the final submissions of his Government. Uganda will then present its second round of oral argument on Friday 30 April 2021, at 3 p.m. At the end of that sitting, Uganda will also present its final submissions. Each Party will have a maximum of three hours to present its arguments in the second round.

As the Parties and their counsel turn to their preparation for the second round of these oral proceedings, I take this opportunity to remind them of Article 60, paragraph 1, of the Rules of Court, pursuant to which oral statements are to be as succinct as possible. The Court has emphasized this requirement in Practice Direction VI. The Parties should not use the second round to repeat statements that they have previously made. The second round is an opportunity to respond to points that were made earlier in these oral proceedings, both during the first round and during the questioning of experts. The sitting is adjourned.

The Court rose at 5.25 p.m.
