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**Cour internationale
de Justice**

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**International Court
of Justice**

THE HAGUE

ANNÉE 2005

Audience publique

tenue le lundi 18 avril 2005, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

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

COMPTE RENDU

YEAR 2005

Public sitting

held on Monday 18 April 2005, at 10 a.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

Présents : M. Shi, président
M. Ranjeva, vice-président
MM. Koroma
Vereshchetin
Mme Higgins
MM. Parra-Aranguren
Kooijmans
Rezek
Al-Khasawneh
Owada
Simma
Tomka
Abraham, juges
MM. Verhoeven,
Kateka, juges *ad hoc*

M. Couvreur, greffier

Present: President Shi
 Vice-President Ranjeva
 Judges Koroma
 Vereshchetin
 Higgins
 Parra-Aranguren
 Kooijmans
 Rezek
 Al-Khasawneh
 Owada
 Simma
 Tomka
 Abraham
 Judges *ad hoc* Verhoeven
 Kateka

 Registrar Couvreur

Le Gouvernement de la République du Congo est représenté par :

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comme agent;

M. Tshibangu Kalala, avocat aux barreaux de Kinshasa et de Bruxelles,

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M. Pierre Klein, professeur de droit international, directeur du centre de droit international de l'Université libre de Bruxelles,

M. Jean Salmon, professeur émérite à l'Université libre de Bruxelles, membre de l'Institut de droit international et de la Cour permanente d'arbitrage,

M. Philippe Sands, Q.C., professeur de droit, directeur du Centre for International Courts and Tribunals, University College London,

comme conseils et avocats;

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M. Yambu A Ngoyi, conseiller principal à la vice-présidence de la République,

M. Mutumbe Mbuya, conseiller juridique au cabinet du ministre de la justice,

M. Victor Musompo Kasongo, secrétaire particulier du ministre de la justice et garde des sceaux,

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Mr. Mutumbe Mbuya, Legal Adviser, *cabinet* of the Minister of Justice,

Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice, Keeper of the Seals,

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comme assistants.

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M. Paul S. Reichler, membre du cabinet Foley Hoag, LLP, à Washington D.C., avocat à la Cour suprême des Etats-Unis, membre du barreau du district de Columbia,

M. Eric Suy, professeur émérite à l'Université catholique de Leuven, ancien Secrétaire général adjoint et conseiller juridique de l'Organisation des Nations Unies, membre de l'Institut de droit international,

S. Exc. l'honorable Amama Mbabazi, ministre de la défense de la République de l'Ouganda,

M. Katumba Wamala, (PSC), (USA WC), général de division, inspecteur général de la police de la République de l'Ouganda,

comme conseils et avocats;

M. Theodore Christakis, professeur de droit international à l'Université de Grenoble II (Pierre Mendès France),

M. Lawrence H. Martin, membre du cabinet Foley Hoag, LLP, à Washington D.C., membre du barreau du district de Columbia,

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M. Timothy Kanyogongya, capitaine des forces de défense du peuple ougandais,

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Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., member of the Bar of the District of Columbia,

as Counsel;

Captain Timothy Kanyogonya, Uganda People's Defence Forces,

as Adviser.

The PRESIDENT: Please be seated. The sitting is open. Before giving the floor to Uganda, I would like to inform you that Judges Buergenthal and Elaraby for reasons of which they have duly notified me are unable to be present on the Bench today. Professor Brownlie, you have the floor.

Mr. BROWNLIE: Thank you, Mr. President.

SELF-DEFENCE

Introduction and Propositions

1. Mr. President, distinguished Members of the Court, it is an honour to appear before you to present the argument on behalf of the Republic of Uganda.

2. If I may begin by stating some propositions which will provide an epitome of the case in relation to the issue of lawful self-defence.

First, the Congo has throughout the pleadings, and beginning with the request for interim measures, been long on accusations and short on matters of proof.

Second, Uganda has been faced with a long-term problem of border insecurity from at least 1994 and until April 1998. The problem reflected the endemic instability in the eastern provinces of the Congo and the absence of adequate control of these areas by the central Government.

Third, after May 1998, and until Uganda took the necessary palliative action in September 1998, the short-term security situation deteriorated rapidly.

Fourth, a key element in the increased threat to Uganda's security was the alliance between the Congo and the Sudan in May 1998, and the major role assumed by the Sudan in training troops, delivering weapons and, eventually, taking a combat role in military measures directed against Uganda.

Fifth, by August 1998, the Sudan, which had for long been involved in armed activities against Uganda on the northern boundary of Uganda, had access to, and was making use of, a series of military airfields in the northern Congo.

These propositions must be supplemented by an appreciation of the political background and the presence of no less than seven groups of anti-Uganda insurgents in eastern Congo, groups which were used as an instrument of national policy by the Congo central Government.

3. The armed groups present in the eastern Congo in August and September 1998 were as follows:

First

The Allied Democratic Forces (ADF). At the material time this was an anti-Uganda insurgent group based in the Congo, supported by both the Government of the Congo and the Government of the Sudan.

The ADF had a major role in the conflicts and threats to Uganda's security and this role begins in 1996. The anti-Ugandan activities of the ADF have been described in Uganda's written pleadings (see the Counter-Memorial, paras. 19-20, 22-23, 387-396; and the Rejoinder, paras. 59-77, 81-82, 655-674). And it is appropriate for my learned friend, Mr. Reichler, to have given prominence to the bloodstained record of the ADF in his impressive overview of this case. The evidence reviewed in the written pleadings and by Mr. Reichler establishes beyond any reasonable doubt that the ADF was used as an instrument of national policy by the Congo acting in conjunction with the Sudan. The ADF was responsible for the appalling attacks within Uganda at Mpondwe in 1996 and the series of attacks in 1998, including the murders at Kichwamba Technical College.

Second

The West Nile Bank Front (WBNF). At the material time this was an insurgent group organized by the Government of the Sudan. At the outset it consisted of the former members of the armed forces of Idi Amin. Troops numbering 3,500 were transported to the Congo by Sudan in August 1998 and then incorporated into the Congolese armed forces (FAC) and used in military operations against Ugandan Government forces in eastern Congo.

Third

The Uganda National Rescue Front II (UNRF II). At the material time this was an insurgent group organized by the Government of the Sudan and deployed with the consent of the Congolese Government on Congolese territory.

Fourth

Forces Armées Ex-Far de Rwanda. These were the Rwandan armed forces under the Government of President Juvenal Habyarimana, who carried out genocide against the Rwandan Tutsi population together with moderate Hutus. Following their defeat by the Rwanda Patriotic Front in 1994, ex-FAR members were organized in Congo to fight Congolese Tutsis and to recapture the Government of Rwanda. In 1998, they were incorporated by President Laurent Kabila into the Congolese Armed Forces to fight against Uganda and Rwanda.

Fifth

The Interahamwe. These forces were Rwandan Hutu militias that, together with the *Forces Armées de Rwanda*, carried out the genocide of Rwanda's Tutsi population in 1994. Afterwards, they fled to Congo and reorganized to fight Congolese Tutsis and the new Government of Rwanda. In 1998, they were also incorporated into the Congolese Armed Forces by President Laurent Kabila to fight against Uganda and Rwanda.

Sixth

The Lord's Resistance Army (LRA). This is an anti-Uganda insurgent group organized by Sudan and based in Sudan and the Congo. It became infamous for the practice of committing atrocities against Ugandan civilians. The activities of the LRA have been reported in recent months in the international press and are currently under investigation by the ICC.

Seventh

The Former Uganda National Army (FUNA). This was an anti-Uganda insurgent group composed of former soldiers of the dictator Idi Amin. It was organized by the Government of Sudan in Congolese territory with the consent of the Congolese Government. Eventually it was incorporated into the Congolese Armed Forces.

4. In addition and to complete the picture, it is necessary to refer to:

The National Army for the Liberation of Uganda (NALU). This was an anti-Uganda insurgent group organized in Congolese territory with the consent of the Congolese Government and supported by the Government of Sudan. In the mid-1990s most of its structure and membership were eventually incorporated into the Allied Democratic Forces (ADF), the Uganda

insurgent group which I introduced earlier. Because this group was incorporated in the ADF, it does not fall within the total of seven armed groups taking action against Uganda.

5. These seven insurgent armed groups supported by the Congo and the Sudan were all present in the eastern Congo in August and September 1998. Their role as long-term players is established by the provisions of the Lusaka Agreement concluded on 10 July 1999. The “armed groups” in the Congo, to be disarmed and demobilized in accordance with the Lusaka Agreement, included the ex-FAR, ADF, LRA, UNRF II, Interahamwe, FUNA, FDD (Forces for the Defence of Democracy of Burundi), WNBF and UNITA (National Union for the Total Independence of Angola). This list, in Annex A of the Lusaka Agreement, Chapter 9, includes the seven “armed groups” I have itemized.

6. It is to be recalled that elements of these seven anti-Uganda armed groups were supported by the Sudan and fought in co-operation with the Sudanese and Congolese armed forces. The circumstances are described in more detail in the Counter-Memorial (paras. 19-23, 47-50) and in the Rejoinder (paras. 57-77, 655-674).

7. In the period 1994 to April 1998 Uganda faced the problem, already alluded to, of long-term border insecurity, involving Ugandan dissidents based in the Congo: I refer to the Counter-Memorial, at paragraphs 334 to 339.

8. In this period a number of substantial armed attacks were perpetrated by groups based in the eastern Congo. The situation has been described in the Counter-Memorial, paragraphs 3 and 4.

“3. The evidence shows that Uganda has been the victim of armed aggression emanating from Congo continuously since 1994. For seven years, without interruption, Uganda has been subjected to devastating cross-border attacks on a regular basis from armed insurgents based in eastern Congo. Except for a brief period, their activities have been co-ordinated by, and subject to the command and control of, the Congolese Government. The purpose of these attacks has been, and remains, to terrorize northern and western Uganda, to seize territory and destabilise and ultimately overthrow the Ugandan Government by force of arms.

4. Various anti-Uganda insurgent groups — some professing loyalty to Idi Amin, the notorious former Ugandan dictator — have operated from Congolese territory during this period, with the full support of successive Congolese governments headed, respectively, by Presidents Mobutu Ssesse Seko, Laurent Kabila and Joseph Kabila.”

9. Mr. President, this picture provided in the Counter-Memorial of Uganda is confirmed by a series of passages in the Reply of the DRC. The fact is that the Government of the Congo has officially acknowledged the presence of all these groups on its territory.

10. In these paragraphs from the Reply the DRC admits the activities of the named groups on its territory but fails to refer to the nature of the relationship between the rebel groups and the Government of the Congo and the collaboration involved. The passages in the Reply are paragraphs 3.13 to 3.16 inclusive.

11. And so, Mr. President, distinguished Members of the Court, it is evident that from at least 1994 until June 1998, the situation was as follows. On her northern boundary Uganda was faced with a hostile neighbour, the Sudan. In addition, on her long border with the Congo, Uganda faced the chronic problem of trans-boundary attacks by well-established armed bands.

12. Thus far I have focused upon the background to the events of August and September 1998, and the background is relevant in order to understand the security problems faced by Uganda.

13. By early September 1998 the situation in the border regions consisted of the following critical elements.

First, the realignments of political and military alliances by President Laurent Kabila in May and June 1998 and the resulting adoption of policies hostile to Uganda.

Second, the formation of a military alliance between the Congo and the Sudan, in May 1998, an alliance which was reaffirmed on 23 August 1998, and again on 18 September 1998. In the result Uganda was faced with a military threat on two fronts. (Counter-Memorial, paras. 38-39, 49-50).

Third, the presence of substantial formations of anti-Uganda rebels in eastern Congo.

Fourth, Uganda's knowledge of the command structure involving the Congolese armed forces, the Sudanese armed forces, and the anti-Uganda armed groups. As Uganda has demonstrated in her Counter-Memorial, by August 1998 the anti-Uganda rebels were no longer merely working in co-ordination with the Congolese armed forces, but were now incorporated into the Congolese armed forces and thus formed part of their command structure.

Fifth and last, the Sudanese armed forces were using a series of military airfields in northern Congo for their operations and were sending troops to fight with the ADF.

14. It is not surprising, in these circumstances, that the States of the region gave explicit recognition of the security concerns of Uganda relating to the endemic civil strife in the Congo, as in the Heads of State Meeting on 7 and 8 September 1998, the Second Victoria Falls Summit, I refer to the Counter-Memorial at paragraphs 299 and following.

15. I now reach the period when Uganda could no longer postpone her decision on what action to take in face of an immediate threat to her territorial integrity. Here are the facts.

16. By 23 August 1998, Ugandan military intelligence had learned that, while in Khartoum, President Laurent Kabila had reaffirmed his military alliance with the Sudan, and arranged for more Sudanese military assistance to his Government, including the contribution of a Sudanese brigade to the taking up of positions hostile to Uganda in eastern Congo. The following day, President Laurent Kabila met with Sudanese Vice-President Ali Othman Taha in Gbadolite, where they agreed on joint military measures against Uganda, including a direct combat role for the Sudanese army and air force, the further incorporation of Sudanese-trained anti-Uganda insurgents into the Congolese armed forces, and an increase in weapons and logistical support to its insurgents operating in eastern Congo. On 26 August 1998, Sudanese Antonov aircraft bombed positions of the Ugandan army at Bunia just across the border with Congo. On 2 September 1998, Sudanese Colonel Ibrahim Ismail Habiballah delivered a planeload of weapons to the Congolese army in Gbadolite for use by UNRF II units that had been incorporated into the Congolese armed forces. A few days later, a Sudanese army brigade of approximately 2,500 troops, under the command of Sudanese Lieutenant General Abdul Rahman Sir Khatim arrived in Gbadolite; it quickly deployed to Businga, and prepared to engage the Ugandan forces in eastern Congo. On 14 September 1998, President Kabila's aides announced that the DRC and Sudan had agreed to jointly reinforce their deployment along the Congo's borders with Uganda and Rwanda. On 18 September 1998, President Kabila again went to Khartoum, where he received pledges of additional Sudanese troops and military equipment; he also met there with leaders of the ADF, WNBF, UNRF II and LRA. I refer to the Counter-Memorial, Annex 90 (pp. 16-18).

17. Mr. President, at this point the danger to Uganda was clear and present. Its forces in eastern Congo, a small force limited to the border area, was extremely vulnerable. The combined Congolese Government and allied forces — including FAC, ADF, WNBF, Interahamwe, and Chadian and Sudanese brigades — positioned between Gbadolite and the Congo-Uganda border outnumbered them by more than ten to one. Faced with this enormous and direct threat, Uganda had two choices: either to withdraw its forces from Congo and suffer the consequences of conceding the entire eastern region of the Congo to the Sudan and the anti-Uganda insurgents, or to reinforce its troops in the Congo and deny the Sudan and the insurgents the strategic positions they required to escalate their armed aggression against Uganda. To defend its borders against numerically superior forces, Uganda had no alternative but to deploy more troops to eastern Congo and to gain control of the strategic airfields in northern and eastern Congo before the Sudanese and Chadian forces and other allied forces could occupy them. Since there are no highways in the region, transport of military supplies and equipment is necessarily by airplane. Control of the airfields was vital to prevent the resupply of the Congolese army units, anti-Uganda insurgents and Interahamwe operating in the border region, and to deny forward bases to Sudanese, Chadian and other Congolese troops from which they could strike at Uganda directly. As Uganda's Minister of State for External Affairs reported to the United Nations General Assembly: "Against the perceived threat of increased destabilisation of Uganda especially by the Sudan using Congolese territory as it had previously done, Uganda deployed additional forces to counter this threat." (Counter-Memorial, Ann. 42, p. 15.)

18. Uganda's decision to take the necessary action was made on 11 September 1998, following the arrival and deployment in the Congo of hostile Sudanese troops. The Government of Uganda's decision was recorded in a confidential, internal document entitled: "Position of the High Command on the Presence of the UPDF (Uganda People's Defence Forces) in the DRC." The reasons for the Government's decision to "maintain forces of the UPDF in the DRC" were stated as follows:

“1. To deny Sudan the opportunity to use the territory of the DRC to destabilize Uganda;

2. To enable UPDF to neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan;

3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda;

4. To prevent the genocidal elements, namely: the Interahamwe, and ex-FAR, which had been launching attacks on the people of Uganda from the DRC, from continuing to do so;

5. To be in a position to safeguard the territorial integrity of Uganda against irresponsible threats of invasion from certain forces.” (Counter-Memorial, Ann. 27.)

19. The action which followed the decision of 11 September 1998 consisted of a series of linked operations with the aim of removing the key military airfields from the control of the Sudan. The measures taken to remove the threats to Uganda’s territorial integrity consisted of operations against the following airfields.

- Isiro (20 September 1998);
- Buta (3 October 1998);
- Bumba (17 November 1998);
- Lisala (12 December 1998);
- Gbadolite (3 July 1999).

20. These actions prevented the Congo and Sudan from using these airfields to attack Uganda or to reinforce and resupply insurgent groups hostile to Uganda. The details are set forth in the Counter-Memorial (paras. 53-54, and 61-64).

21. The pressure of events and the Ugandan responses are inevitably reflected in the public statements of Ugandan leaders and diplomats. On 24 August 1998 President Museveni stated that “if unilateral action intensifies, Uganda may be forced . . . to take its own independent action in the protection of its own security interests” (Reply of the Democratic Republic of Congo, Ann. 108; IRIN 486). Such contemporaneous statements are of particular importance.

22. In November 1998 the Government of Uganda published a substantial statement concerning the “Conflict in the Democratic Republic of Congo”. This appears in the Counter-Memorial at Annex 31. This addresses both the problem of genocide in neighbouring areas of the Congo and the security concerns of Uganda. The document as a whole deserves careful study. Of particular importance are the passages dealing with the aggressive activities of the Sudan, which are as follows:

“The situation was not helped when the current rebellion erupted in the DRC on 2 August 1998. Sudan, the main backer of Ugandan rebels, has continued to play an active role. Uganda cannot afford to leave a vacuum lest Sudan takes advantage of the situation and intensifies its support to Ugandan rebels on DRC territory. Indeed, Sudan has since mobilized more Ugandan rebel factions and moved them to the DRC with motives to launch massive attacks on Uganda. This could only happen with the tacit approval of the authorities in Kinshasa.

The military incursions that have been inflicted on Uganda by Sudan are well known. These include the yearly aerial bombardments and cross border incursions on Ugandan territory. Initially Sudan was using its own territory as the launching pad for Ugandan rebels. When they — that is the Sudan — lost much of it in Southern Sudan to the SPLM/SPLA, they increasingly started to use the DRC territory. There is evidence that during the fight for Kindu between DRC forces and Congolese rebels, the latter captured many Ugandan rebels of different factions backed by Sudan . . .”

The document continues:

“All along, Sudan has been designing plans to use the many and larger airports/airfields in Eastern DRC to launch massive aerial attacks on Uganda. Following the events of 2 August 1998, this advantage could not be allowed them. For its security and because there was no semblance of Congolese authority in Eastern Congo bordering us, Uganda had no alternative, but to take control of key airports/airfields in Eastern DRC.

Sudan has been indirectly destabilizing Uganda from DRC since 1993; and since eruption of war in the DRC on 2 August 1998, diplomatic and other contacts between DRC and Sudan have increased. Consequently Sudan’s involvement in the DRC war intensified leading to the deployment of its troops (including Ugandan rebels based in Sudan) to Kisangani and Kindu. Some of the Ugandan rebels captured when these two towns fell to Congolese rebels, testified that they were recruited from refugee camps in Sudan by President Kabila’s son and Taban Amin, son of Uganda’s former dictator Idi Amin who is also sponsoring Ugandan rebels.

Sudan directly sponsors and provides bases to several rebel groups opposed to the Uganda government. These include West Nile Bank Front (WNBF), Uganda National Rescue Front II (UNRF II), and Lord’s Resistance Army (LRA) whose Camps in Sudan are at Jabelin, Nesitu, Lilia, Rojo Hills and Juba.” (Counter-Memorial, Ann. 31, pp. 10-11.)

23. In his important speech in the General Assembly on 23 March 1999, Mr. Mbabazi, the Defence Minister of Uganda, also provided a detailed analysis of the crisis facing Uganda in August 1998 (Counter-Memorial, Ann. 42).

24. A further statement on the subject was made by Minister Mbabazi on 8 September 1999 (Counter-Memorial, Ann. 48).

25. From this sequence of statements by the most senior Ugandan sources it is apparent that the primary purpose of the Ugandan action beginning in September 1998 was self-defence and the

removal of the causes of cumulative and persistent violations of the territorial integrity of Uganda and the murder of its citizens.

Mr. President, it is now time to deal with the relevant legal questions.

26. Uganda relies upon the inherent right of self-defence in general international law which is reserved in Article 51 of the United Nations Charter. The authoritative legal sources reviewed in the Counter-Memorial justify the following submission:

“For the purposes of applying the provisions of Article 51 of the Charter, the concept of an ‘armed attack’ includes the following elements, taken both separately and cumulatively:

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

27. The status of the activities of armed bands as a form of armed attack has been recognized by various authorities.

In the *Nicaragua* case (on the merits) the Court stated the position as follows:

“In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’. This description, contained in Article 3, paragraph (g) of the Definition of Aggression annexed to General Assembly resolution 3314, may be taken to reflect customary international law. [And the Court concludes]: *The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been*

classified as an armed attack rather than as a mere border incident had it been carried out by regular armed forces.” (I.C.J. Reports 1986, p. 103, para. 195.) (Emphasis added.)

28. Moreover, the legal literature provides firm support for the view that the use of armed bands operating from the territory of a host State against another State as an instrument of national policy constitutes an armed attack within the meaning of Article 51 of the Charter. The sources are set forth in chronological order in the Counter-Memorial (para. 349), and I do not propose to repeat them here.

29. In this context it is submitted that the giving of logistical support to armed bands with knowledge of their objectives constitutes an armed attack.

The definition of aggression adopted by the General Assembly in 1974 by consensus provides as follows in Article 3:

“Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression. [As the Court pointed out]:

.....

(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.” (Emphasis added.)

30. The final paragraph of this definition calls for some commentary. Such activity is characterized not as “indirect aggression” but as an “act of aggression”. Moreover, the phrase “or its substantial involvement therein” strongly indicates that the formulation extends to the provision of logistical support. The drafting history is examined in the dissenting opinion of Judge Schwebel in the *Nicaragua* case (*I.C.J. Reports 1986*, pp. 341-347, paras. 162-171).

31. The other relevant provision in the General Assembly’s definition of aggression is paragraph (f), which includes:

“(f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state.”

In the light of the substantial evidence relating to the role of the Sudan in carrying out actions jointly with the Congo, using Congolese territory, the relevance of this element is self-evident.

32. It is necessary to refer next to the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

First of all, the Declaration sets forth various principles of which the first is as follows:

“The principle that States shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”

The commentary attached to this text includes a number of more specific principles, two of which are of particular relevance.

First:

“Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.”

And second:

“Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

33. The two paragraphs of commentary provide significant clarifications. In particular, the second paragraph makes clear that the principle prohibiting the use of force applies to forms of assistance in acts of civil strife in another State. The second paragraph also confirms that acquiescence in “organized activities . . . directed towards the commission of such acts” is unlawful “when the acts referred to in the present paragraph involve a threat or use of force”.

34. The majority in the *Nicaragua* case did not accept that the provision of weapons or logistical support to rebels constituted an “armed attack”. However, this position was criticized in the substantial dissenting opinions of Judges Schwebel and Sir Robert Jennings (*I.C.J. Reports 1986*, pp. 331-347 and p. 543). The reasoning of the Court has also been the subject of careful criticism by Judge Higgins, as she now is, in her General Course at the Hague Academy, which was published as *Problems and Process* in 1994 (pp. 250-251).

35. In any event, the circumstances of the present case are substantially at variance with the facts on which the Court relied in the *Nicaragua* case. In the present case the organized activities aimed at Uganda were much more powerful in effect than the provision of weapons or logistical

support. The armed bands formed part of a command structure which involved the central Government of the Congo and co-ordination with a third State, the Sudan.

The application of the law to the facts

36. Mr. President, it is now necessary to apply the law to the facts. For this purpose I shall use four separate elements of the concept of armed attack.

37. The first element is as follows: the sending by a State of armed bands to the territory of another State in conditions in which, had the operation been carried out by regular armed forces, it would have been classified as an armed attack, rather than as a mere frontier incident.

38. Commencing in May and June 1998, the Government of the DRC co-ordinated the military operations of the ADF against Uganda, through senior officers of the Congolese armed forces, the FAC, who planned and supported cross-border attacks by the ADF in and against Uganda (Counter-Memorial, paras. 33-41). Following the Congo's alliance with the Sudan and its more open collaboration with the anti-Uganda insurgents, FAC officers co-ordinated and supported ADF attacks on: Kichwamba Technical School, 8 June 1998, when more than 100 Ugandan civilians were killed; Kanyamura, 10 June, when five civilians were killed; Banyangule, 26 June, when 11 were killed or wounded; Kiburara, 5 July, when 19 people were abducted; Kasese, 1 August, when three people were killed; and many more, as described in the Counter-Memorial at paragraphs 40, 62 and 95 to 97. The planning, size, frequency and destructiveness of these assaults against Ugandan territories and nationals demonstrate that they were not mere "frontier incidents", but full-fledged "armed attacks" within the meaning of Article 51.

39. The second element of the concept of an armed attack can now be applied. It is as follows: the sponsoring of armed bands by a State by the provision of logistical support in the form of weapons, training or financial assistance; in these circumstances, and in the presence of a shared purpose, the armed bands become agents, or "*de facto* organs", of the sponsoring State.

The ADF, WNBF and other anti-Uganda insurgent groups regularly received logistical support, weapons, training and financial assistance directly from the Government of the Congo, and from the Government of the Congo acting in collaboration with the Government of the Sudan. The "shared purpose" of the Government of the Congo and the anti-Uganda rebels, as well as the

Government of the Sudan, was to destabilize Uganda's Government by means of armed attacks and aerial bombardment from Congolese land and air bases. Among other ways, "the shared purpose" is established by the planning and co-ordination by the Congo's armed forces of ADF attacks against Uganda and the incorporation into the Congolese armed forces and deployment against Ugandan Government forces of thousands of WNBF combatants (Counter-Memorial, paras. 34-36, 47-50, 54).

40. I now move to the third element in the concept of armed attack: the operations of armed groups which form part of the command structure of the armed forces of the State concerned, whatever the nomenclature used to describe individual units.

Approximately 3,500 troops of the West Nile Bank Front were airlifted by the Government of the Sudan to points in the Congo, at the direction of the Government of the Congo, and incorporated into the official Congolese armed forces, where they fought alongside Congolese army units and were subject to the command and control of Congolese army officers (Counter-Memorial, paras. 47-50, 52 and 62-63). ADF participation in the command structure of the Congolese armed forces is demonstrated by the planning and co-ordination by senior Congolese officers of the ADF's attacks against Uganda.

41. The fourth element of an armed attack is as follows: in other circumstances in which there is evidence of a conspiracy between the State concerned and the armed bands fighting against the State taking action in self-defence.

Further evidence of what was in fact a tripartite conspiracy between the Government of the Congo and the anti-Uganda insurgents is provided by the frequent consultations and co-ordination in September 1998 between President Laurent Kabila and the leaders of the ADF, Yusuf Kabanda, and the WNBF, Taban Amin, about military strategy and operations against Uganda (Counter-Memorial, paras. 35-36).

42. In her Reply, the Congo contends that the response of Uganda to the situation was not proportionate. The proportionality of Uganda's response is attested by the following factors all of which were operative at the material time:

First, the conclusion of an alliance between President Kabila and other forces, hostile to Uganda;

Second, the long history of terrorism and aggression by armed bands established on the territory of the Congo and the appalling effects of that aggression against the population of Uganda, as in the atrocity at Kichwamba on 8 June 1998;

Third, the results of the formation of the military alliance between President Laurent Kabila and the Sudan and the extent of the Sudanese involvement (Counter-Memorial, paras. 38-41 and 78-88). The Sudanese forces were established in a series of locations in northern Congo and their presence and the existence of a Sudanese-related command structure, were the subject of a licence from the Congo; and

Fourth, the appearance of Sudanese armed forces in the Congo was a new and serious threat to Uganda's territorial integrity, especially in the light of the Sudan's long history of aggression against Uganda, her stepped-up role in training and delivering materiel to the FAC and anti-Uganda insurgents, and her efforts to rally other States, including Chad, against Uganda.

43. Mr. President, the four factors indicated, and their cumulative effects, constitute a test of the outer limit of proportionality, that is to say, an absence of excessive reaction. But there are several other sources of evidence to the effect that the action taken by Uganda was not out of scale to the threats to her security.

44. In the first place the reaction of the Security Council was cautious and the Council avoided accusations of aggression. Thus at the meeting held on 31 August 1998 the President of the Security Council made the following statements on behalf of the Council:

“The Security Council expresses its deep concern about the current conflict in the Democratic Republic of the Congo, which poses a serious threat to regional peace and security. The Security Council expresses alarm at the plight of the civilian population throughout the country.

The Security Council reaffirms the obligation to respect the territorial integrity and national sovereignty of the Democratic Republic of the Congo *and other States in the region* and the need for all States to refrain from any interference in each other's internal affairs. In this context, the Council calls for a peaceful solution to the conflict in the Democratic Republic of the Congo, including an immediate ceasefire, the withdrawal of all foreign forces, and the initiation of a peaceful process of political dialogue with a view to national reconciliation.” (Emphasis added.)

45. A similar formulation appears in the statement by the President on 11 December 1998 (S/PRST/1998/36). And, Mr. President, in both these statements the President of the Council calls for the withdrawal of all foreign forces without qualification.

46. The first resolution of the Council on the situation in the Congo was resolution 1234 adopted on 9 April 1999. The *consideranda* of the resolution include the following:

“The Security Council:

.....

Expressing its firm commitment to preserving the national sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo *and all other States* in the region,

.....

Recalling the inherent right of individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations,

.....

Welcoming the appointment by the Secretary-General of his Special Envoy for the peace process for the Democratic Republic of the Congo,

Stressing that the present conflict in the Democratic Republic of the Congo constitutes a threat to peace, security and stability in the region.” (Emphasis added.)

And the operative paragraphs included:

“The Security Council

1. *Reaffirms* the obligation of all States to respect the territorial integrity, political independence and national sovereignty of the Democratic Republic of the Congo and other States in the region, including the obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations, and further *reaffirms* the need for all States to refrain from any interference in each other’s internal affairs, in accordance with the Charter of the United Nations.”

47. The Statement of the President of the Council on 24 June 1999 reflected the previous statements and the content of resolution 1234 (S/PRST/1999/17) to which I have already referred.

48. The statements of the President of the Council also reaffirmed the support of the Council for the regional mediation process facilitated by the President of Zambia on behalf of the SADC in co-operation with the OAU and with support from the United Nations. The regional peace process prospered and on 10 July 1999 there was signed the Lusaka Ceasefire Agreement. The *consideranda* in the Agreement included the following item:

“[The Parties to this Agreement]

.....

Cognisant of the fact that addressing the security concerns of the DRC and neighbouring countries is central and would contribute to the peace process.”

49. In resolution 1258 adopted on 6 August 1999, the Security Council:

“1. *Welcomes* the signing of the Ceasefire Agreement . . . in Lusaka on 10 July 1999 which represents a viable basis for a resolution of the conflict in the Democratic Republic of the Congo.”

50. Mr. President, the documents of this period clearly reflect the sense within the Security Council, within the region, and within the OAU, that the security concerns which were central to the peace process and the situation overall were those of neighbouring countries in addition to those of the Congo.

51. These considerations relate to the general context of the issue of proportionality and are by no means the most pertinent criterion for the purposes of a legal appreciation of the facts.

52. Other concrete indications of the proportionality of the Ugandan response to aggression form part of the more immediate context. In the first place at all material times the Ugandan troops on Congolese territory were significantly outnumbered. As Mr. Reichler has already pointed out, in August 1998 the combined Congolese Government and allied forces positioned between the Uganda border and Gbadolite outnumbered the Ugandan forces based in the Congo by more than ten to one.

53. And, furthermore, a particularly cogent consideration is the decision embodied in the Lusaka Agreement of 10 July 1999 to allow Uganda to keep all of her troops deployed without reduction. The text of the Agreement is at tab 5 in the judges’ folder.

54. Mr. President, the substance of proportionality consists of the elements of purpose, necessity and causation. If an armed attack is mounted by an insurgent group into or against the territory of Uganda, the question whether this constitutes an armed attack justifying a response against the territory of the Congo, and the bases of operation of the insurgents, will depend on the following criteria:

First, were the operations carried out with the purpose, shared with the Government of the Congo, of destabilizing Uganda?

Second, did the attacks consist of operations mounted, in military terms, from within the Congo?

Third, were the attacks mounted by armed groups acting on behalf of the Congo?

55. The evidence presented on behalf of Uganda indicates an affirmative answer in each case. The nature of the situation faced by Uganda over a period of years is to be analysed with the aid of certain necessary analytical tools and within the appropriate context.

56. The superficial but unhelpful choice is between a doctrine of anticipatory or preventive action and the requirement of direct attacks across a boundary. This dichotomy is not appropriate in relation to several scenarios met with in practice. In elaborating the concept of armed attack and putting it to work, the analytical tools called for by legal logic are causation and the principles of State responsibility, which are applicable in combination.

57. In present circumstances, whilst the focus is in the first place upon the general definition of armed attack or aggression, it is ultimately also upon the identification of the source, that is, the responsible government, in relation to specific attacks or patterns of specific attacks. Consequently, it is logical and indeed essential to apply the principles of State responsibility to the precise subject-matter.

58. In my submission, the key is the principle of agency and it is not surprising to find that Article 8 of the Draft Articles adopted on first reading by the International Law Commission provided in part as follows:

“Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

(a) it is established that such person or group of persons was in fact acting on behalf of that State;” (YILC, 1974, II (Part One), 283).

59. The counterpart Article in the Articles on State Responsibility adopted on the second reading in 2001 is as follows:

“Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” (Report of the International Law Commission, Fifty-third session, 2001, p. 103.)

60. On the basis of this sound legal logic State responsibility is generated for armed attacks perpetrated by armed groups which are *in fact* agents or *de facto* agents of the DRC.

61. The principles of State responsibility are thus applied in conjunction with the concept of armed attack.

The proportionality, and the military or factual necessity, of action in response to armed attacks is enhanced if there is a pattern or sequence of linked attacks. This is not offered as an independent proposition of law but as a proposition of fact based upon standard conceptions of security and common sense.

62. In completing this analysis I shall return to the role of purpose and causation.

The primary attribute of an armed attack is its seriousness: and that is a matter of appreciation by the Court.

The element of seriousness is in the present context to be related both to the degree of force employed and to other factors. What is defensive, and what is proportionate or reasonable, depends on several factors apart from the degree of force. One such factor is the purpose: which in this case was to destabilize the Government of Uganda and to destroy or weaken her public order system.

63. A further factor is the agency, that is, the organizational connection between the armed group carrying out the operation, and the central Government of the Congo. Indeed, there was also a tripartite relationship involving the armed groups, the Governments of the Congo and the Sudan.

64. It is these causal connections which justify a defensive reaction to neutralize the bases from which the armed groups operated as *de facto* organs of the Congolese Governments and of the Sudan.

65. And, Mr. President, a significant element in the causation, the engine of necessity, is the sudden increase in the tempo and gravity of the armed attacks in June to August 1998. At this point it is appropriate to recall the sequence of armed attacks which took place in the period from June until August 1998. The relevant map is attached as tab 1 of the judges' folder.

66. The sequence of armed attacks was as follows.

First, on 8 June 1998 the attack at Kichwamba: as Uganda has pointed out, the results of the alliance between the Congo and the Sudan included the attack by the ADF on Kichwamba

Technical School on 8 June 1998. A force of more than 100 insurgents, armed by the Congo and the Sudan, carried out this merciless attack on innocent technical school students. According to the ADF participants themselves, the attackers divided themselves into three units: one group of 24 staged an ambush on the way to the school to prevent Ugandan soldiers from rescuing the students; a second unit of 36 attacked the school, armed with high-powered weapons and “8 jerricans of petrol”; and the third unit attacked the Uganda army detachment at nearby Kanyamura. The students were either burned alive in their dormitories, shot and killed while trying to escape the flames, or abducted and forcibly taken back to the Congo (Counter-Memorial of Uganda, Anns. 20 and 82). More than 50 students were burned alive and at least as many were shot and killed trying to escape.

Second, on 10 June 1998 there was a further attack in the same area, resulting in the deaths of five Ugandans.

Third, on 26 June 1998 an ADF attack took place at Banyangule village in Bundibugyo district, leaving 11 victims dead or wounded.

Fourth, on 5 July 1998 at Kiburara in Kasese district, 19 seminarians were abducted from St. John’s Seminary.

Fifth, on 1 August 1998 the ADF attacked Kasese town, burning shops and houses and killing three people.

Sixth, on 6 August 1998 the ADF attacked the town of Kyarumba near Kasese, killing 33 people.

67. This sequence of attacks involved the purpose of destabilizing Uganda’s Government and weakening its public order system, a purpose shared with the central Government of the Congo. The attacks were carried out by groups supported by the central Government of the Congo and acting as its agents. The sequence constituted a pattern of armed attacks for which the Congo was responsible and which were mounted from bases within its territory. In the result military action against those bases within the Congo became an operational necessity within the framework of a continuum of attacks from Congolese territory, and the escalation of the military action against Uganda in the period June to August 1998.

Mr. President, if it were convenient, that would be a good place for me to stop.

The PRESIDENT: You may continue.

Mr. BROWNLIE:

68. This series of destabilizing attacks preceded and partly coincided with the events I have already described, namely the formation of a military alliance between the Congo and the Sudan, the threat to Uganda on two fronts, the evidence that, in August 1998, the anti-Uganda rebels were incorporated into the Congolese armed forces, and the evidence that the Sudanese armed forces were using a series of military airfields in northern Congo for their operations. The armed attacks accelerated as the Sudan brought in more troops and supplies. These threats continued to develop in intensity in early September, 1998.

69. In the result Uganda's decision to take the necessary military action was made on 11 September 1998 in face of the deployment in the Congo of further hostile Sudanese armed forces.

Criticisms by the Democratic Republic of the Congo

70. That, Mr. President, is the case on behalf of Uganda, but it remains for me to examine the response of the Congo to the written pleadings of Uganda on the question of self-defence. I shall be as brief as possible, not least because the difficulties presented by this case concern at the end of the day the application of the pertinent legal principles and not the reiteration of familiar propositions.

71. In a general sense the Parties have joined issue on the state of the law. Both the Counter-Memorial of Uganda and the Reply of the Congo contain substantial discussions. But some substantial differences remain. The Congolese position remains much more dogmatic and simplistic than that of Uganda. Uganda has pointed out that the legal position involves the construction and application of the phrase "armed attack". As I have sought to demonstrate today, there are situations in which it is unrealistic and practically impossible to insist on a distinction between a direct response to an armed attack and anticipatory or preventive action.

72. My distinguished opponent, Professor Corten, presents a two-dimensional view of the matter. In the first place he fails to report the Ugandan position correctly. Uganda's legal position

is not based upon the concepts of self-protection or vital interests or preventive action or pre-emptive action (CR 2005/3, paras. 6, 32 and 35).

73. Uganda's position is not contradicted, as my opponent suggests, by the legal literature and he refers to the Reply of Congo at page 212 for citations. The fact is, Mr. President, that the legal literature has nearly always failed to examine the specific issue of the persistent activities of armed bands and the concept of an armed attack. Thus, the alleged unanimity of writers is not very impressive in qualitative terms.

74. Moreover, it is not always appropriate to apply the democratic principle to the counting of writers. The treatment of the authorities by the Congo is superficial. Thus, Professor Yoram Dinstein is not given any prominence, although he is the author not of a few paragraphs in a textbook but of a well-known monograph now in a third edition on the subject of *War, Aggression and Self-defence*. He is also a long-standing member of the Institut de droit international. Dinstein is one of the few authorities to provide a sophisticated discussion of the problems, and his views appear in the Counter-Memorial at pages 199 to 201.

75. In this same general context the Congo is affronted by the fact that Uganda should indicate the existence of an alternative view to that espoused by the majority of the Court in the *Nicaragua* case (see the Reply, para. 3.127, and Professor Corten, CR 2005/3, para. 21). But each case must be decided on its own facts and the facts of the present case are by no means similar to those of the *Nicaragua* case. Moreover, for what it matters, the Court does not adhere to the rigid doctrine of precedent. This is familiar and has been pointed out by the leading authorities, including Hersch Lauterpacht, *The Development of International Law by the International Court*, published in 1958, at pages 8 to 15.

76. I come now to one of the most serious flaws in Professor Corten's argument. On the one hand, he asserts that there were no "armed attacks" by the Congo against Uganda (CR 2005/3, paras. 10-13). These assertions are to be understood as statements that the attacks on Uganda launched by armed bands based in the Congo were not under the control of the Central Government of the Congo. At the same time, the Congo admits the presence on its territory of long-established groups of militia (see the Rejoinder of Uganda, paras. 65-67).

77. The missing link is provided by the principles of State responsibility and the duty to prevent the use of national territory by armed bands launching armed actions against neighbouring States. My opponent fails to recognize that, in accordance with the principles of State responsibility, the Congo is responsible for the armed attacks of the various rebel groups. This responsibility arises in the conditions set forth in the Definition of Aggression of 1974 in which paragraph (g) calls for the direct involvement of a State. But, Mr. President, it also exists in accordance with the principles of general international law in conditions where there is simply a failure to control the activities of armed bands. In her Reply (para. 3.131) the Congo seeks to argue that the responsibility of the territorial sovereign is limited by the provisions of Article 8 of the Articles on State Responsibility adopted by the International Law Commission on a second reading in 2001. This Article has been quoted already, and it refers to conduct directed or controlled by a State. According to the Congo this provision applies a stringent test to the attribution to a State of the acts of private persons.

78. This is a debating point and is misleading in its result. Article 8 of the Articles is not concerned with matters of self-defence, which is dealt with in Article 21 of the draft, by a reference (in general terms) to the provisions of the Charter. Article 56 of the Articles makes it clear that other principles of general international law remain in place. And, in this context, it may be recalled that on Wednesday afternoon of last week, both Professor Sands and Professor Salmon referred repeatedly to the duty of prevention, or of vigilance.

Moreover the last Article of the codification by the International Law Commission provides that: "These Articles are without prejudice to the Charter of the United Nations."

79. Where does this reasoning lead? It inevitably leads back to Article 51 of the Charter, which reserves the right of self-defence in terms of customary law "if an armed attack occurs".

80. As in the case of the other aspects of the concept of an armed attack, armed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51. And thus, there is a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defence by neighbouring States.

81. I shall now move on to an examination of the argument presented by Professor Klein. His first proposition is that Uganda has not respected the condition of necessity (CR 2005/3, para. 4). Necessity is therefore seen by him as a separate and additional requirement of self-defence.

82. Mr. President, there is probably no harm in adding such a requirement but it is surely tautologous and unnecessary. Self-defence itself is a special form of necessity, after all. The concept of necessity simply implies that the conduct remain within the appropriate purpose. This is the burden of the letter from Webster to the British Government in the *Caroline* correspondence, which states that “the act justified by the necessity of self-defence, must be limited by that necessity”.

83. It is reasonably clear that the limits are more effectively set by the principle of proportionality, and this requirement I have already addressed this morning. In any event in the context of customary law the Court in the *Nicaragua* case tended to combine the criteria of necessity and proportionality — I refer to *I.C.J Reports 1986*, paragraph 194, and this passage is quoted in paragraphs 43 and 74 of the Judgment in the *Oil Platforms* case.

84. Professor Klein then gives a partisan and truncated account of the problem of proportionality. His analysis is confined to the action taken and ignores the causes of the action and the factual context.

85. I have already presented an analysis of the pressing and cumulative factors which created Uganda’s necessity of self-defence. As the Court will appreciate the applicant State has failed to provide an adequate picture of the relations between the Congo and Uganda in the critical period since 1996.

86. Professor Klein, like the Congolese Reply, refers to the allegedly large area involved in the Uganda operations. But Mr. Reichler has shown that this assertion is not rooted in the facts, by pointing to the Harare Disengagement Plan map (see CR 2005/6, paras. 101-102). According to the evidence, Uganda’s forces were largely confined to the immediate border area, and to securing strategic airfields in eastern and northern Congo.

87. Professor Klein also refers to the depth of penetration of the Congo by Ugandan forces (see CR 2005/6, para. 19). This is a perfect example of taking one element in the situation, and in

the whole sequence of events, and seeking to give it a pivotal role. But, as Mr. Reichler has pointed out, it is artificial to apply an all-purpose mileage formula for measuring the proportionality of a defensive operation (see CR 2005/6, para. 83). According to the evidence, the penetration was dictated by the need to stop Uganda's enemies from continuing to use certain airfields to supply and reinforce the rebel groups that were conducting armed attacks against Uganda.

88. Several of our distinguished opponents have referred to the length of time entailed in the Ugandan operations. This complaint plainly ignores a whole range of circumstances, including the persistence of border attacks, the overall strength of the armed groups receiving assistance from the Congolese and Sudanese Governments, the weakness of Congolese institutions, and the operation of the Lusaka system of public order in the Congo.

89. Professor Klein also invokes the principle that peaceful methods of settlement must be exhausted prior to a resort to the use of force (see CR 2005/3, paras. 9-16). Professor Klein quotes only one source for the alleged principle: a report of Professor Ago to the International Law Commission. But, with all respect to Judge Ago's memory, the principle does not constitute a limitation upon the right of self-defence if that right is justified on its normal bases. It is not surprising to find that the commentaries of the Commission to the Articles eventually adopted on a second reading in 2001 make no reference to such a limiting principle.

90. In this context, Professor Klein seeks to draw advantage from the fact that in the key period between May and September 1998 Uganda made no formal protests to the Congo (see CR 2005/3, para. 13). The facts are that President Museveni made several explicit public complaints about the threats to Uganda's territorial integrity emanating from the Congo and this is recognized in the Congo's Reply (paras. 3.56-3.61). President Museveni made statements on 24 August and 16 September 1998.

Mr. President, I have nearly finished.

The PRESIDENT: We will have a break in ten minutes. Will that be enough for you?

Mr. BROWNLIE: I am literally going to finish in two minutes.

The PRESIDENT: All right, you may continue.

Mr. BROWNLIE:

91. But there is much more to be recalled than particular statements by President Museveni, significant though they were. Early in August 1998, Uganda had launched a major diplomatic effort to bring the conflict in the Congo to an end. This effort resulted in a succession of summit meetings, including Victoria Falls I on 7 and 8 August 1998 and Victoria Falls II on 7 and 8 September 1998. The participants released a Joint Communiqué indicating that the security concerns of the neighbouring States, as well as those of the Congo, needed to be addressed as part of an effective settlement. In the words of the Joint Communiqué:

“We agreed on the need to address the security concerns of the Democratic Republic of the Congo and those of the neighbouring countries. In this regard, we declare our preparedness to assist in whatever ways possible, to achieve that objective.” (Counter-Memorial of Uganda, Ann. 26, p. 2.)

Professor Klein referred to Uganda’s assistance to the MLC Congolese rebel organization. As Mr. Reichler pointed out on Friday, the MLC was a party to the Lusaka Agreement. Tomorrow, in his discussion of Lusaka, he will point out the special status given to the MLC by the parties to the Lusaka Agreement, including the DRC Government.

92. Mr. President, before closing it may be helpful to the Court if I present a summary of the Ugandan position on the legal issues concerning the activities of armed bands.

First, in the case in which the territorial sovereign tolerates the activities of armed bands and the armed attacks which they launch against a neighbouring State, the failure to control renders the State harbouring such armed bands susceptible to action in accordance with Article 51 by the victim State. This consequence is the result of the application of well-recognized principles of State responsibility and the existence of direction and control by the territorial sovereign is not necessary.

It will be apparent to the Court that the applicant State does not deny the existence of the facts to which that formulation applies.

Secondly, there is responsibility for the armed attacks and a liability to face defensive action, in those cases in which there is direct involvement in accordance with the General Assembly’s

definition of aggression. Such direct involvement is denied by the Congo in spite of the substantial evidence to the contrary.

Mr. President, there is one final point. If the concept of necessity of self-defence is to be applied on the basis of effectiveness and common sense, it is surely the view of the victim State and its nationals which must prevail. And that view must be based upon an objective standard related to the *effects* of the armed attacks. The consequence is that, for the victim State, the results remain the same and the *necessity* remains the same, whether the State from which the armed attacks emanate *is* directly involved or is only responsible for harbouring or tolerating the armed bands responsible.

And in any event, in this case the evidence presented by Uganda, which was described by Mr. Reichler on Friday, and which will be further discussed by the two speakers who follow me to the podium, demonstrates that the DRC is responsible not only for harbouring and tolerating the armed bands, but for incorporating them into its own armed forces and otherwise supporting and co-ordinating their activities against Uganda both directly and, especially, in collaboration with the Sudan.

That concludes my presentation. I would thank the Court for its patience.

The PRESIDENT: Thank you, Professor Brownlie. The Court now goes into recess for ten minutes, after which the hearings will be continued.

The Court adjourned from 11.30 to 11.40 a.m.

The PRESIDENT: Please be seated. I now give the floor to the counsel and advocate, His Excellency the Honourable Amama Mbabazi.

Mr. MBABAZI: Thank you, Mr. President.

Introduction

1. Mr. President, distinguished Members of the Court, it is a great honour to appear before you today. I am grateful for the privilege this distinguished Court has given me, and given Uganda,

to address the claims of armed aggression that have been made against Uganda by her neighbour, the Democratic Republic of the Congo.

2. I feel it is most appropriate for me to begin my presentation by introducing myself to the Court. I am, first of all, a lawyer. I was educated at Makerere University, Kampala and received my law degree in 1975. Today, I am privileged to serve as the Minister of Defence of the Republic of Uganda. From 1986 to the present, I have held the following positions in the Government of Uganda:

- between 1986 and 1992, I was Director General of the External Security Organization in the President's Office;
- from 1992 to 1997, I was Minister of State for Defence;
- between 1997 and 1998, I was Minister of State in the President's Office in charge of Political Affairs;
- from 1998 to 2001, I was Minister of State for Foreign Affairs, in charge of Regional Co-operation; and
- since 2001, I have been Minister of Defence. I am also currently the Chairman of the Ugandan Army's Historical Command.

3. In each of the positions I have held since 1986, I have had significant responsibility for managing relations between Uganda and Zaire, as it was then called, or the Congo, as it is called today; I communicated directly and frequently with the highest officials of the Congo and Zaire about our bilateral relations; I represented Uganda in bilateral and regional conferences that involved relations between Uganda and the Congo; I was privy to all of the Ugandan Government's intelligence concerning political and military matters in the Congo; I participated in all strategic decisions taken by the Government of Uganda in relation to the Congo; I represented Uganda in meetings with the United Nations Secretary-General, the Security Council and the General Assembly concerning the conflict in the Congo; I co-chaired the negotiating sessions at Lusaka, Zambia in early July 1999 that produced the international agreement known as the Lusaka Agreement, by which all of the parties to the conflict in the Congo agreed to end the war, remove its causes, establish a new government of national unity in the Congo and ultimately to withdraw all foreign forces; and I have continued to participate in all subsequent peace conferences, and

bilateral discussions between Uganda and the Congo, with a view to maintaining the peace and promoting friendly relations between our two States.

4. Mr. President, drawing on my direct involvement in all of these matters from 1986 to the present moment, I am in a unique position to speak for the Government of Uganda about five specific points, which I propose to discuss today. *First*, the fact that Uganda has suffered armed aggression emanating from Congolese territory since at least 1994. *Second*, the fact that Uganda had no role in the Congolese rebellion against President Laurent Kabila that began on 2 August 1998, or in any other offensive military operations in the Congo during the month of August 1998. *Third*, the fact that Uganda decided to send new military forces into the Congo, and to deploy them beyond the immediate border areas, on 11 September 1998, and the reasons why she did this. *Fourth*, the fact that the parties to the Lusaka Agreement, signed in July 1999, expressly recognized that the armed attacks against Uganda from rebel forces based in the Congo were sufficiently serious as to justify the introduction and continued presence of Ugandan armed forces into Congolese territory until the groups were disarmed and disbanded; and the fact that in the Lusaka Agreement the Government of the DRC expressly consented to the maintenance of Ugandan military forces in the Congo until such time as the conditions fixed in the Agreement for their departure were fulfilled. And *fifth*, the fact that Uganda and the Congo signed a bilateral peace agreement at Luanda, Angola in September 2002, in which the DRC again consented to the presence of Ugandan military forces in regions of the Congo where the armed groups continued to operate, and provided an agreed timetable for the withdrawal of all other Ugandan forces, which, in accordance with the Luanda Agreement, were fully and finally withdrawn from Congo, as of 2 June 2003.

I. The armed aggression against Uganda during the Mobutu era

5. Mr. President, I will now turn to my first point; that is, the fact that Uganda has suffered armed aggression since at least 1994 emanating from the territory of what was once Zaire and is now the Democratic Republic of the Congo. Although both Mr. Brownlie and Mr. Reichler have addressed this issue, I would like to revisit it briefly today so that the Court may better appreciate

the context in which Uganda has been forced to make her national security decisions concerning the defence of her borders.

6. As Mr. Reichler described last Friday, Uganda had three distinct, though ultimately linked, forces launching attacks against her from Congolese territory during the Mobutu era. The first of these forces consisted of the various bands of anti-Uganda rebels using the eastern Congo as their home base from which to conduct cross-border attacks against Uganda: these included the Former Uganda National Army, or FUNA; the Uganda National Rescue Front II, or UNRF II; the National Army for the Liberation of Uganda, or NALU; the Allied Democratic Forces, ADF; the West Nile Bank Front, WNBF; and the Lord's Resistance Army, LRA.

7. These groups consisted mainly of former soldiers and other supporters loyal to one or the other of Uganda's two former dictators: Idi Amin and Milton Obote, each of whom presided over murderous régimes that killed or imprisoned hundreds of thousands of innocent Ugandans, and terrorized the country between 1971 and 1986. During that period, the name Uganda had the misfortune of being synonymous with brutal, corrupt, dictatorial rule. These groups were the remnants of those terrible régimes. The goal of each of these groups after 1986 was to overthrow the Government led by President Yoweri Museveni and restore the old order; or, in the case of the Allied Democratic Forces, to establish a religious fundamentalist State along the model of the Sudan. The groups all had bases in eastern Congo, adjacent to western Uganda.

8. Beginning in 1994, President Mobutu of Zaire deliberately gave them sanctuary, supplied them, and increasingly took part in co-ordinating their activities against Uganda. In this manner, Zaire itself became the second aggressor against Uganda. I hope the Court will indulge me for a few minutes while I explain the phenomenon of Zaire's support for the anti-Uganda groups, because it introduces a theme that acquires even more significance later, in 1998 and 1999, when Congolese aggression against Uganda was renewed and escalated, ultimately leading to Uganda's decision to act in self-defence.

9. The primary catalyst for President Mobutu's alliance with the anti-Uganda armed groups operating from his country was the fall of the Government of Rwanda led by President Juvenal Habyarimana in 1994. President Mobutu was an ally and a strong supporter of President Habyarimana, whose Government was dominated by members of the Hutu ethnic group, and which

was engaged in a civil war against the Rwandan Patriotic Front (the RPF), which was composed mainly of members of the Tutsi ethnic group. President Mobutu was a main supplier of arms to President Habyarimana and his Government. President Habyarimana died in a plane crash on his return from successful peace negotiations with the RPF, which promised to end the civil war in Rwanda. That successful peace conference had been arranged and facilitated by Uganda's President, Yoweri Museveni, who witnessed the signing of the peace agreement.

10. Following President Habyarimana's tragic death, Hutu extremists in his army and in army-supported militias known as "Interahamwe" — all of whom opposed a peace agreement — launched a virulent anti-Tutsi campaign in Rwanda. They committed genocide — the slaughtering of more than 800,000 Tutsis and moderate Hutus, over a 90-day period in 1994. The Security Council of the United Nations did nothing to stop this massive killing, despite the urgent pleas of Uganda and several African States, among others. In fact, instead of sending peacekeepers to stop the killing, the United Nations withdrew those who were already there, removing the last protective barrier and leaving to their horrible fate the Tutsis of Rwanda, and those Hutus who heroically opposed the mass murder. I am afraid that we Africans learned a terrible, but necessary, lesson from this: that we could not count on the Security Council or the international community at large to care enough about Africa to help us keep the peace. If even the premeditated mass slaughter of more than 800,000 African civilians was not enough to bring United Nations peacekeepers to our part of the world, there was little or no reason to believe that anything less destructive of human life than that would bring them. We learned that we must rely on ourselves to assure our own security and safety.

11. The genocide destroyed any possibility that the peace agreement between the warring Rwandan factions brokered by President Museveni would hold up. The result was that the predominantly Tutsi RPF initiated a military offensive, took the capital Kigali, and established a new Government. The remnants of the Former Rwandan Armed Forces, the army of the defeated Rwandan Government, and the Interahamwe militia, fled across the border to Zaire (along with more than a million Hutu refugees who feared reprisal from the new Government). President Mobutu welcomed them and gave them sanctuary. He also helped the former Rwandan soldiers and militiamen reorganize themselves; he rearmed them, and he gave them logistical support in

attacks against the forces of the new Government of Rwanda. They also attacked the Tutsi communities of eastern Congo, along the border with Rwanda, killing thousands of Congolese citizens.

12. As Mr. Reichler stated last Friday, President Mobutu supported and encouraged attacks against Uganda as well as Rwanda because he saw Uganda as the ally of the new Government of Rwanda, and its chief source of support. He hoped that, by tying Uganda down with the defence of her own borders with Zaire, she would be less capable of assisting Rwanda, whose Government he wanted to bring down through his support of the former Rwandan soldiers and militias. So, President Mobutu simultaneously supported these Rwandan groups against the new Government of Rwanda, and the Ugandan rebel groups that had long been based in eastern Congo against the Government of Uganda.

13. In addition to the Government of President Mobutu and the anti-Uganda rebel groups based in his country, the third force opposed to the Government of Uganda was the Sudan, Uganda's neighbour to the north. There had long been enmity between Uganda and the Sudan, largely as a result of the Sudan's close relationship with and support of Idi Amin while he was in power, and the remnants of Idi Amin's army which were given sanctuary in southern Sudan after Idi Amin was driven from power. The Sudan helped to organize, arm, train and co-ordinate the activities of such groups as the Former Uganda National Army (FUNA), the Uganda National Rescue Front II (UNRF II), West Nile Bank Front (WNBF), and the Lord's Resistance Army (LRA). The LRA became notorious for kidnapping thousands of Ugandan children, brutalizing them, and forcing them to become child soldiers or sex slaves. As Mr. Brownlie said earlier this morning, based on the formal referral of this matter by the Government of Uganda, the LRA leaders are the subject of an investigation by the International Criminal Court.

14. Sudan did not operate only within her own borders. Instead, after 1994, she actively collaborated with President Mobutu and helped to organize, arm, train and co-ordinate the activities of the anti-Uganda groups based in eastern Congo, and in particular, those that were loyal to former dictator Idi Amin. Between 1994 and 1997, the Sudan and Zaire became partners in crime against Uganda. Under the terms of their alliance, the Sudan stepped up its activities against Uganda, including the arming and training of anti-Uganda rebels, and Zaire agreed to make her territory,

including her airfields, available for the purposes of supplying the insurgents and attacking Uganda. The consequence of this alliance was a sharp increase in the armed attacks against Uganda.

15. The armed aggression against Uganda, and the responsibility of President Mobutu and his Government, between 1994 and 1997 cannot be disputed. As Mr. Reichler has previously described, Uganda introduced the statements of numerous former or captured insurgents directly testifying to the relevant facts in Uganda's Counter-Memorial. I should emphasize here that these statements were not taken or manufactured for the purpose of this case. These are contemporaneous official records of interrogation of prisoners and defectors by Ugandan military and intelligence personnel; and they were considered sufficiently reliable by the Government of Uganda at the time they were taken so as to form the basis for critical decisions on political and military strategy and tactics that Uganda ultimately made. In Uganda's considered view, they fully demonstrated the complicity of President Mobutu's Government in the armed attacks against Uganda throughout this period. This was confirmed to me by Congolese officials in the Government of President Laurent Kabila after President Mobutu was gone from the scene.

16. The war against President Mobutu in 1996 and 1997 was carried out — and won — largely by the army of Rwanda. There was, of course, involvement by Congolese rebel forces themselves, under the leadership of Laurent Kabila, who became the new President of the country in May 1997. But the bulk of the fighting was carried out by the Rwandan army, which invaded the Congo and ultimately took Kinshasa and installed Mr. Kabila as President. This is a fact that everyone in the region recognizes, including the Congolese. That is why, even after he was installed in power, and for more than a year thereafter, President Kabila's army consisted mainly of the Rwandan soldiers who brought him to power. Mr. Reichler described this fact to the Court on Friday, and I understand that the DRC has admitted it before this Court.

II. Uganda did not support the rebellion against President Kabila or engage in offensive military operations in the DRC during August 1998

17. Mr. President I shall now proceed to my second point — the fact that Uganda played no role in the August 1998 rebellion against President Laurent Kabila, and that she did not engage in any offensive military activities in the Congo during August 1998.

18. Uganda watched with growing concern as the stability of President Kabila's Government slowly eroded from the time he assumed power in May 1997 until May 1998. The last thing Uganda wanted was instability in her large neighbour to the west, because that could only mean greater instability for the remote eastern region of the Congo, the region that bordered Uganda. The factor that appeared to cause the most trouble for President Kabila with the Congolese people was his near total dependence on Rwanda, and on the Congolese Tutsis whom the Rwandan forces brought to Kinshasa and installed in key positions in the new army and security establishment. Many Congolese were offended by what they saw as the subordination of Congolese national interests to those of Rwanda. Nationalist pride was stirred, and hostility against Rwanda spread. In its uglier form, this manifested itself as well in hostility to the Congolese Tutsis, who were regarded by other Congolese as agents of Rwanda. Accusations that President Kabila had sold out his country to Rwanda and its Congolese Tutsi allies proliferated, and led to mass anti-government demonstrations.

19. President Kabila's response to nationalist attacks on his Government was to terminate his military dependency on Rwanda. He did this by Presidential Decree on 27 July 1998. In that decree, he ordered all Rwandan armed forces to leave the DRC immediately. The Decree expelling Rwandan forces was greeted enthusiastically by the Congolese population, many of whom celebrated by rampaging against Congolese Tutsis, whom they considered Rwandan sympathizers. Many Tutsis were slaughtered by government-incited mobs in the closing days of July 1998. To replace the departing Rwandan soldiers, President Kabila expedited efforts to form a new army composed of the only other experienced military and paramilitary forces in the Congo, the former soldiers of President Mobutu, the former soldiers of the armed forces of Rwanda and the Interahamwe militiamen who had served the former (Hutu) Government of Rwanda, and the anti-Uganda rebel groups operating in eastern Congo.

20. On 2 August 1998, directly following the expulsion of the Rwandan soldiers and the slaughter of the Congolese Tutsis, several battalions of the Congolese army stationed in eastern Congo declared themselves in rebellion against the Government of President Kabila. Rwanda immediately sent thousands of troops across the border into Congo. Within two weeks, they had

swept across much of eastern Congo, and seriously threatened to continue on to Kinshasa and remove President Kabila from power.

21. After the war against President Laurent Kabila broke out on 2 August 1998, Uganda was asked by Rwanda to send in the UPDF in support. Uganda considered this request at the highest levels. Uganda understood Rwanda's reasons for intervening militarily in the Congo. President Kabila's alliance with the forces that had committed genocide in Rwanda, and which were preparing to invade Rwanda to retake power, was clearly unacceptable to the régime in Kigali, as was the government-instigated assault on Congolese Tutsis. Uganda, too, criticized these actions by President Kabila and his Government, but told President Kagame of Rwanda that she would not intervene militarily in the Congo. President Museveni made the firm decision that Uganda would remain completely neutral with regard to the fighting in the Congo. Instead of supporting either side, President Museveni launched a vigorous campaign for a regional peace conference to stop the fighting, and to address everyone's security concerns, including Rwanda's about President Kabila's alliance with the former Rwandan soldiers and militias, and Uganda's concerns about renewed Congolese support for the anti-Uganda groups.

22. President Museveni's efforts led to a Summit among the Heads of State of Uganda, Zimbabwe, Tanzania, Zambia, Namibia, Rwanda and the DRC convened on 7 and 8 August 1998 (five days after the outbreak of fighting in the DRC) at Victoria Falls in Zimbabwe. As Minister of State for Regional Co-operation, I was a senior member of President Museveni's delegation. The outbreak of fighting in Congo was the topic of discussion at the Summit. I plainly recall that President Kabila's Minister of Justice at the time, Mwenze Kongolo, angrily accused Rwanda (and only Rwanda) of fomenting the rebellion against President Kabila and invading Congolese territory. He did not make any such charges against Uganda because, as he very well knew, Uganda was not involved in any of these actions.

The PRESIDENT: May I interrupt you for a moment. The Court considers that your statement is being made, not in your own name, but in the name of the Republic of Uganda, and your statement will be given the treatment as is normally given to the statement made by any other counsel and advocate. Please continue.

Mr. MBABAZI: Thank you, Mr. President.

23. Only much later, did the DRC begin to accuse Uganda of “invading it” in early August 1998. As I have stated to the Court, this accusation is completely untrue. To the contrary, Uganda made a deliberate decision at the time *not* to send troops into Congo, but to pursue a regional peace settlement instead. It is true that Uganda already had some troops in eastern Congo when the rebellion against President Kabila and his Government broke out at the beginning of August. There were three battalions of UPDF (Uganda People’s Defence Force), in the border areas. These troops were in the Congo with the consent of the Congolese authorities, including President Kabila himself. As my colleagues have already described to the Court, President Kabila invited Uganda to station her forces in eastern Congo to pursue and subdue the rebel bands that attacked Uganda from Congolese bases. This invitation was reconfirmed in the written Protocol of 27 April 1998, signed by Uganda and the DRC. This Protocol is included in the judges’ folder at tab 11. The consent given by the DRC to the presence of Ugandan forces in Congolese territory in the border areas was never revoked or withdrawn. The DRC’s advocates in these proceedings are mistaken when they argue that President Kabila’s decree of 27 July 1998 formally expelled Ugandan soldiers from the Congo. That decree was directed expressly at the Rwandan soldiers in the DRC, and only at the Rwandan soldiers. It made no mention of Ugandan soldiers. It was certainly the understanding of both Uganda and the DRC at the time that decree was issued that it had no bearing on the Ugandan forces in the border areas of the Congo with the express consent of the DRC Government. I should like to add, as well, that Uganda never received any communication from the DRC Government, formal or informal, direct or indirect, withdrawing that consent.

24. Uganda did not materially add to her troops inside the Congo, or deploy them beyond the immediate border areas during the month of August 1998. After Ugandan forces in the DRC came under heavy attack by the ADF and some Congolese army elements at Beni on 7 August 1998, the Ugandan forces pursued the attackers north to Bunia, and took control of Bunia Airport on 13 August. On that same date, the UPDF sent to Bunia some reinforcements. The following day, the UPDF deployed a small number of troops to Watsa, also in the border area, to the north of

Bunia, to monitor the situation in that area. All of the Ugandan forces were confined to the border area.

25. Since she began these proceedings, the DRC has attempted to place Ugandan soldiers at the scene of various battles in early August, especially Kitona, in western Congo. As Chairman of the UPDF Historical Command and Minister of State for Regional Co-operation at the time, I am aware of all of the decisions that were made regarding the security threat from the Congo, and Uganda's responses to it, including the positioning and deployment of Ugandan forces inside the DRC. I affirm to the Court, in the name of the Government of Uganda, that no forces under Ugandan command participated in any activities in Kitona in August 1998 or at any other time. No Ugandan prisoners, therefore, were taken at those locations. I have personally investigated whether a Mr. Salim Byaruhanga, or anyone with a name similar to that, was ever in, or associated with, the Ugandan armed forces; and I can report to this Court that the answer is in the negative. If such a person was ever in the custody of the DRC, he can only have been a civilian detainee. He was never a Ugandan soldier. The Russian T-55 tank that may have been found near Kitona may be similar to tanks operated by the UPDF. However, it is not ours. Nor is there any reason to conclude that it is. Almost all of the States that had military forces in the Congo — including Rwanda, Angola, Zimbabwe, the Sudan and the DRC itself — had and operated Russian-built T-55 tanks. Since that particular T-55 tank did not belong to Uganda, Mr. President, I can only assume that it belonged to one of those States.

III. Uganda's decision in September 1998 to send troops into the Congo

26. I shall now address my third point, that is, the fact that Uganda introduced substantial military forces into the Congo in the middle of September 1998, in self-defence against the persistent armed attacks from the Congo and the grave and imminent threat to her security posed by these attacks and the combined efforts of the anti-Uganda groups, the Government of President Kabila and the Government of the Sudan who were then all united against Uganda.

27. Mr. Reichler has described for the Court the evidence showing that, by August and September 1998, Uganda was under attack from armed bands concentrated in eastern Congo, which had been incorporated into the army commanded by President Kabila and were supplied and

directed by the Sudan. The Sudan itself had deployed several thousand of its own troops, along with thousands more Chadian troops, in eastern Congo whence larger-scale attacks and aerial bombardments could easily be launched against Uganda. Mr. Brownlie has explained how these events constituted illegal armed aggression against Uganda, and how they justified the introduction of Ugandan armed forces into Congo as a lawful exercise of Uganda's inherent right to self-defence. Tomorrow morning, the Court will hear from Major General Edward Katumba Wamala, who is a military and intelligence expert and who served as commander of several of Uganda's military units, including the Ugandan military force in the DRC from 2000 to 2001. General Katumba Wamala will further describe the evidence about the attacks of the armed bands, and the support they received from the Government of the DRC and the Government of the Sudan, in the period leading up to early September 1998.

28. In broad outline, here is what we saw from our positions as senior members of the Ugandan Government, responsible for the security of our nation: in early August, as I mentioned, the Congolese rebellion broke out. The collaboration between President Kabila and both the anti-Uganda groups and the Sudan accelerated. The anti-Uganda groups, with the assistance of the Sudan, were merged into the Congolese armed forces. Taban Amin, son of Idi Amin and a leader of the West Nile Bank Front, one of the anti-Uganda groups nurtured by Sudan, was later given the rank of Major General in the Congolese army and appointed to President Kabila's General Staff in Kinshasa. The Sudan airlifted her own troops into several locations in eastern and northern Congo, and began taking control of all airfields in those parts of that country, at the invitation of President Kabila. And at the Sudan's behest, Chad entered the fighting at her side. Amidst all this, Congolese soldiers forced their way into Uganda's embassy in Kinshasa, held the ambassador and other diplomats at gunpoint and threatened them. Then, at a meeting on 24 August, the Sudan and the DRC agreed on still further joint military measures against Uganda, including additional assistance to the groups in eastern Congo. The Ugandan troops in the Congo, pursuant to the earlier invitation of the DRC Government, came under increasing threat and suffered several direct land and aerial assaults, including bombardment by Sudanese aircraft.

29. At a policy level, Uganda's choice was this: either (1) withdraw her troops from the border areas in eastern Congo and suffer the consequences to her ability to protect her borders

against the forces that were already attacking her, as well as those who were on their way to attack her; or (2) introduce sufficient military forces into the Congo to deny Uganda's attackers the strategic positions they needed to launch their armed attacks against her, and to eliminate the armed groups and drive the hostile Sudanese and Chadian forces out of the Congo.

30. This was not an easy decision for the Government of Uganda to make. Sending her combat forces onto foreign soil was not something Uganda favoured. The Government was deeply troubled by the high cost of doing so, primarily in terms of loss of life but also in terms of the economic costs and the terrible financial strains these would place on the budget of a poor country. And, in war, the outcome is never assured. But Uganda had tried to the best of her ability to initiate a regional peace settlement, and we generated little interest. President Kabila himself had failed even to attend the summit meetings we arranged in Victoria Falls and Windhoek, Namibia. Zimbabwe, Angola and to a lesser extent Namibia had sent their troops into the DRC to support President Kabila against Rwanda. The Sudan and Chad had sent troops to fight against Uganda. Uganda had no choice but to recognize the reality of the situation. There was a war going on, and Uganda was a target of some of the warring parties. Taking military action in self-defence presented itself as Uganda's only viable alternative.

31. On 11 September 1998, the High Command met with President Museveni. Mr. Brownlie has read to the Court from the contemporaneous, internal document memorializing the High Command's decision. The document was not prepared for public disclosure or public relations; it was labelled "Secret", and it was intended to remain so. Only after this case was filed, and at the urging of her counsel did Uganda decide to declassify it so that it could be submitted to the Court. The document sets forth the High Command's reasons — its only reasons — for sending her forces into the Congo. I would like to recall for the Court the first two of those reasons:

“1. To deny Sudan the opportunity to use the territory of the DRC to destabilize Uganda.

2. To enable UPDF to neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.”

32. Uganda thus dispatched her combat troops to the Congo in exercise of her right of self-defence. Because Uganda's mission was a self-defensive one, her strategy and operations were at all times dictated by the imperatives of self-defence. The UPDF went no further and sent

no more men into the Congo than were absolutely necessary to achieve Uganda's mission: to deny her attackers the strategic positions they needed to continue launching cross-border attacks against her; to eliminate the armed groups operating against Uganda; and to drive Sudanese and Chadian forces out of the Congo. By July 1999, after Uganda's forces had taken the airfield at Gbadolite and succeeded in expelling Sudanese and Chadian forces from the Congo, President Museveni made it very clear to all parties that the war was essentially over for Uganda, and that the UPDF would now begin to disengage from the front lines.

33. At the beginning of the conflict, Uganda and other States called upon the Security Council to take action to help stop the fighting and to assure the security of the borders of the DRC and neighbouring States, including Uganda. The circumstances did not permit Uganda to wait for Security Council action before the introduction of Ugandan troops into the Congo. As of 11 September 1998, the gravity of the armed attacks against Uganda, the military collaboration between the DRC and the Sudan on behalf of the rebels who were conducting those attacks, and the rapid approach toward Uganda of hostile Sudanese and Chadian army contingents made immediate action on our part in self-defence of Uganda imperative. We knew we could not count on timely intervention by the Security Council to head off the crisis. The Council's inaction in the face of the genocide in Rwanda was still fresh in our minds. As it was, it took the Security Council until April 1999 to adopt its first resolution on the conflict. By that time, efforts among the States of the region, including Uganda and the DRC, were already far advanced towards the achievement of a comprehensive peace settlement.

IV. The Lusaka Agreement

34. That brings me to the fourth point I would like to present to the Court, that is, the fact that the Lusaka Agreement constituted consent for Uganda's troops to stay in the DRC pending the disarming and disbanding of the armed groups whose cross-border attacks had caused Uganda to send troops to the DRC in the first place.

35. I personally led Uganda's delegation to Lusaka and was her chief negotiator in connection with the treaty. I also served as co-chair of the negotiating sessions. I am thus not only intimately familiar with the terms of the Agreement, I am familiar as well with the spirit that

motivated them, and the understandings of the parties. As such, I believe I am well qualified to present to the Court the position of the Government of Uganda with respect to the Lusaka Agreement.

36. The negotiations culminated on 10 July 1999 when the Heads of State of Uganda, the DRC, Rwanda, Zimbabwe, Angola and Namibia signed the Lusaka Agreement. The three Congolese rebel organizations — the MLC, RCD-K and RCD-G — signed the Agreement at the end of July.

37. From Uganda's perspective, there are two main points to be drawn from the Lusaka Agreement. The first is the multilateral recognition that Uganda had legitimate security concerns in the DRC. The second is the fact that the Agreement authorized Uganda to keep her troops in the DRC pending fulfilment of the parties' prior obligations thereunder, including steps designed to eliminate the threat to Uganda.

38. Last Friday, Mr. Reichler began the process of analysing the text to demonstrate the ways in which these points are manifested in the Agreement. He will continue doing so tomorrow, when he addresses the Court on the subject of the consent given by the DRC for the stationing of Ugandan troops in Congolese territory between 10 July 1999 and 2 June 2003. It is not my purpose to repeat or preview either of Mr. Reichler's presentations here.

39. Instead, I will address myself today to the intentions of the parties to the Lusaka Agreement, as expressed in the text and in their subsequent conduct pursuant to the Agreement. The text reflects the fact that, throughout the negotiations that led to the Agreement, Uganda was insistent that any settlement must take proper account of her security concerns. From the beginning of the conflict, Uganda had been the leading voice for a negotiated settlement. She was not, however, prepared to sacrifice her security for an artificial peace. The other delegates not only understood this, but repeatedly expressed their understanding of the harm Uganda had suffered at the hands of the armed groups based in eastern Congo, especially while they were supported by the Governments of the DRC and the Sudan. The multilateral recognition of the threat the armed groups posed to Uganda found clear expression in the text of the Agreement itself, especially in the explicit identification, by name, of different armed groups of anti-Uganda rebels that had been attacking Uganda from Congolese territory, and in the commitment to eliminate all of the groups

through their disarmament, demobilization, resettlement and reintegration. Further, because of the seriousness of the threat posed by the enumerated armed groups, the parties agreed, and the Lusaka Agreement expressly provided, that the foreign forces then present in Congolese territory, including Uganda's forces, should remain in place until the disarmament and demobilization of the armed groups was completed.

40. Mr. President, the DRC's advocates have argued that the Lusaka Agreement set an unconditional, six-month deadline for the withdrawal of foreign troops from the Congo. Again, Mr. Reichler will explain the textual reasons why this argument cannot stand, when he addresses this Court tomorrow. From the perspective of Uganda's lead representative in Lusaka, and co-chair of the negotiations, I can assure the Court that none of the parties to the Agreement, including the DRC, had any intention of creating such a fixed and artificial deadline. It was a premise of the negotiations on which all parties, including the DRC, agreed that the time frames set up in the Agreement were contingent on the fulfilment of prior deadlines set forth in the Agreement. No one disagreed. It was universally understood.

41. I respectfully refer the Court to tab 5 of the individual judges' folder. The implementation calendar to the Agreement contained in Annex B provides that the twelfth "ceasefire event", after disengagement of forces and other matters, shall be the opening of a "national dialogue" designed to yield a "new political dispensation" in the DRC. The thirteenth "ceasefire event" is the closure of the national dialogue. No. 16, after the establishment of new institutions and the deployment of United Nations peacekeepers, is the "disarmament of armed groups", including the anti-Uganda insurgents. Then, No. 17 is the "orderly withdrawal of all foreign forces".

42. This is not and was never meant to be a simple list of unco-ordinated events. Each prior step was designed to pave the way for the next; each subsequent step was designed to build on the one before it. Saying No. 17, i.e. the withdrawal of foreign forces, could occur before No. 16, that is the disarmament of armed groups, if the disarmament happened to be delayed for any reason, makes no more sense than saying No. 13, that is the closure of the national dialogue, could come before No. 12, that is the opening of the national dialogue, if the opening of the dialogue happened to be delayed.

43. I can put the same point as follows: the Congolese national dialogue envisioned in the Lusaka Agreement was intended to create the conditions under which new institutions could be created, including a new broadly inclusive national government and a new army, which in turn would create the environment in which peacekeepers could be deployed, which, in turn, was necessary to create the conditions in which the disarmament of armed groups could take place. Only after all this was accomplished was the withdrawal of foreign troops envisioned.

44. This was never disputed by anybody, including the DRC. The fact that the DRC herself understood that the withdrawal of foreign troops, including Uganda's, was not an artificial deadline untethered to the other ceasefire events is demonstrated by her subsequent actions. Acting pursuant to the Lusaka Agreement, on 8 April 2000 — that is to say *nine* months after the Lusaka Agreement had been signed and *three* months after the initial 180-day target for the withdrawal of foreign forces — a formal plan for the disengagement of forces in the Congo was signed in Kampala by *all* the parties to the Lusaka Agreement, including the DRC. Known in the region as the Kampala Disengagement Plan, this document is located at tab 6 of the judges' folders. It reconfirmed the consent that had been given in the Lusaka Agreement to the presence of Ugandan and other foreign forces in the Congo pending the disarmament, demobilization, resettlement and reintegration of the armed groups that had been utilizing Congolese territory to destabilize Uganda and other neighbouring States. Never once during the negotiations of the Kampala Disengagement Plan did the DRC voice a suggestion that foreign troops should have left earlier, or that they should leave immediately, or that they should leave at any time before the problem of armed groups was resolved — through their demobilization, disarmament, repatriation and reintegration.

45. Mr. Reichler referred on Friday to the fact that the Secretary-General himself took the position that foreign forces should not be withdrawn until the armed groups were properly neutralized. In April 2001, President Museveni announced that Uganda would be withdrawing her troops from the DRC immediately; that is, even before the armed groups were fully disarmed, as stipulated in the Lusaka Agreement and subsequent disengagement plans. Because of the international implications of our actions, I travelled to New York to meet with the Secretary-General and deliver President Museveni's message. We met in his office at the United Nations Headquarters in New York and I explained to him that President Museveni had

decided to withdraw Ugandan troops because it had never been intended by the parties to the Lusaka Agreement that Ugandan forces would be responsible for maintaining public order in eastern Congo. That was supposed to have been the responsibility of United Nations peacekeeping forces, and was a role that Uganda neither wanted nor felt capable of performing. The Secretary-General responded by stating that a unilateral Ugandan withdrawal would destabilize the peace process and quite possibly leave a vacuum that could be exploited by the enemies of the Congo. He urged us in the strongest terms to keep our troops in place in the Congo and remain engaged in the peace process in accordance with the Lusaka Agreement.

46. I told the Secretary-General that Uganda would consider his request, but, in light of the burden on Uganda, we would be grateful if he would put it in writing. He did so in his 4 May 2001 letter to President Museveni attached at tab 13 of your individual judges' folder. Mr. Reichler will review the actual text of the letter with the Court tomorrow. For the moment, I will just add that the Secretary-General is an exceptional man and an extraordinarily skilled diplomat. His letter is necessarily couched in carefully chosen diplomatic language. Even so, Mr. President and distinguished Members of this Court, its meaning is clear. Taking account of the context makes it clearer still: the fulfilment of the Lusaka Agreement required Uganda to keep its troops in the DRC pending completion of other aspects of the Agreement, including the disarming and disbanding of the designated armed groups.

V. The Luanda Agreement between Uganda and the DRC

47. I have now come to the fifth and final point in my presentation; that is, the fact that the bilateral agreement signed by Uganda and the DRC at Luanda, Angola, in September 2002 again recognized the threat to Uganda's security posed by armed groups of anti-Uganda rebels operating from bases in eastern Congo, and extended the DRC's consent for the presence of Ugandan troops in Congolese territory to protect against cross-border armed attacks by these rebels. The Luanda Agreement included a timetable for the gradual withdrawal of Ugandan forces from the DRC, and the DRC incrementally increased its capacity to police the border region with its own security forces. Although the timetable had to be extended by mutual agreement, it eventually provided that

Ugandan forces would be fully and finally withdrawn from the Congo by the end of May 2003. In fact, the last Ugandan troops departed from the Congo on 2 June 2003. None have gone back.

48. The Luanda Agreement, signed by Uganda and the DRC on 6 September 2002, is at tab 8 of your individual judges' folder. Tomorrow, Mr. Reichler will offer the Court a textual analysis of the Agreement and its legal implications in this case, especially as regards the issue of consent by the DRC to the stationing of Ugandan forces in Congolese territory.

49. By September 2002, relations between Uganda and the Congo had progressed to the point where both Parties felt it would be appropriate to take further steps towards a final peace. Uganda still remained very concerned about her security situation. Despite Uganda's best efforts, bands of rebels remained in eastern Congo. Civilian authority in the region remained inadequate. Neither the Congolese central Government nor the local authorities responsible for the area had succeeded in dealing with that threat.

50. Having participated in the negotiations of the agreement reached at Lusaka, I believe I can ably reflect the Government of Uganda's views on it. As reflected in the text of the Agreement, the Congolese delegation at Luanda, including President Joseph Kabila, recognized the gravity of the continuing threat to Uganda posed by the rebels based in eastern Congo. They agreed—once again—that it would be appropriate for Ugandan troops to remain in the DRC until another mechanism for guaranteeing Uganda's security was put in place. In this connection, I respectfully refer the Court to Article 1, paragraph 4, of the Luanda Agreement, which provides:

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

51. Thus, as of September 2002, the DRC expressly acknowledged that Uganda's security concerns still were sufficiently weighty, and the absence of effective Congolese authority in the region sufficiently problematic, as to necessitate the maintenance of Ugandan troops on Congolese territory. The DRC's consent to the presence of Ugandan troops in eastern Congo, given three years earlier in the Lusaka Agreement, was in this manner reconfirmed and extended for an additional period.

52. For her part, Uganda agreed at Luanda to withdraw from the DRC all Ugandan troops, except those expressly authorized by the DRC to remain “on the slopes of Mt. Ruwenzori”.

Uganda fulfilled her obligations under the Agreement and withdrew her troops from the DRC. In fact, Uganda went beyond the Agreement and withdrew all her troops from the Congo, including those which were authorized to remain on the slopes of Mount Ruwenzori. As I have stated, Uganda's last troops were withdrawn from the DRC on 2 June 2003. On that date, Uganda's military presence in the Congo terminated.

Conclusion

53. Mr. President and Members of the Court, I have now reached the end of my presentation. I trust I have shown that Uganda introduced her military forces into the Congo for the sole and legitimate purpose of self-defence, in response to the armed aggression, and grave and imminent threats to her security from armed groups acting in concert with the Governments of the DRC and the Sudan, including Sudanese armed forces themselves operating from Congolese territory with the sole purpose of attacking and destabilizing Uganda. In Uganda's view, Uganda's actions constituted a lawful exercise of our inherent right of self-defence under Article 51 of the United Nations Charter and customary law. I trust the Court will reach the same conclusion.

54. Thank you, Mr. President and Members of the Court, for your kind and patient attention to my remarks, and for allowing me the privilege of appearing before you today.

The PRESIDENT: Thank you, Your Excellency.

Now I would like to reiterate that the Court considers the Honourable Mr. Mbabazi to have taken the floor as counsel and advocate, a member of the Uganda delegation. That is the capacity in which you were listed and not as an expert or witness called by Uganda to give evidence. Besides, the procedures set out in Article 57 and Article 63 of the Rules of Court had anyway not been followed and the Honourable Mr. Mbabazi had not been called upon to make a declaration as a witness or as an expert under Article 64 of the Rules of Court. The Court considers that the statement made by the Honourable Mr. Mbabzi had been made not in his own capacity but in the name of the Republic of Uganda and your statement will be given the treatment as is normally given to the statements made by any other counsel and advocate.

Finally, this brings to a conclusion this morning's hearings. The next session of the hearings will be held tomorrow morning at 10 o'clock. The sitting is adjourned.

The Court is rose at 1.05 p.m.
