INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING ARMED
ACTIVITIES
ON THE TERRITORY
OF THE CONGO

DEMOCRATIC REPUBLIC OF THE CONGO
V.
UGANDA

UGANDA'S OBSERVATIONS ON THE DRC'S RESPONSES TO JUDGES' QUESTIONS

13 MAY 2005

I. Uganda's Observations on the DRC's Response to the Question of Judge Vereshchetin

1. Uganda recognises that it is for the DRC to identify what she considers to be the time period covered by each of her claims against Uganda. However, there are two aspects of the DRC's 6 May 2005 response to Judge Vereshchetin's question that call for comment by Uganda. First, Uganda will comment on the DRC's allegation that Uganda's so-called aggression against the DRC continued past 2 June 2003, the undisputed date of the final withdrawal of Ugandan military forces from Congolese territory. Second, Uganda will comment on the DRC's allegation that, until 2 June 2003, Ugandan military forces "occupied" parts of the DRC.

2. With regard to the first issue, Uganda simply wishes to note that the DRC has never presented the Court with *any* evidence that Uganda's agents or representatives, including her military forces, committed any wrongs against the DRC after Ugandan troops were fully and finally withdrawn from Congolese territory on 2 June 2003. To be sure, at the oral hearings, the DRC's Agent and other Congolese spokespersons *accused* Uganda of interference in the DRC's internal affairs, but they never supplied any supporting *evidence*, and Uganda denies having committed any wrongful acts against the DRC after 2 June 2003, just as she denies having wronged the DRC prior thereto.

3. With regard to the second issue, the DRC persists in arguing that Uganda "occupied" Congolese territory continuously from August 1998 through June 2003, and consequently that Uganda bears responsibility for certain alleged wrongs committed by Ugandan military forces and by others, including Congolese rebel organisations, during that period. Uganda wishes to point out, below, that the claim of "occupation" is mistaken both in fact and in law.

4. Uganda has shown in her written pleadings, at the oral hearings, and most recently in her 6 May 2005 response to the question put by Judge Kooijmans, that her military forces in the Congo between August 1998 and June 2003 were limited in number and confined to a few strategic locations. (Rejoinder, paras. 193-203; CR 2005/14 pp. 45-47, paras. 27-33; 6 May 2005 Response to Judge Kooijmans.) Further, Uganda has shown that her military forces in the DRC did not exercise administrative control even in the specific locations where they were present. (Rejoinder, paras. 201-03; CR 2005/14 pp. 45-47, paras. 27-33.) Administrative control was always exercised by the Congolese rebel organisation that was the dominant power in the particular region of the Congo: in Equateur and western Orientale Provinces, the MLC; and in eastern Orientale Province and the northern part of North Kivu Province, the RCD-K (also known as the RCD-ML). After the signing of the Lusaka Agreement in July 1999, the MLC's and the RCD-K's exercise of administrative authority in these areas of the DRC were fully legitimised by the parties to that Agreement, including the DRC government.

5. Beyond the fact that Ugandan forces did not exercise or assume responsibility for civil administration, they were never *capable* of controlling the vast expanse of DRC territory claimed by the Congo's advocates, given the low number of troops and the relatively few locations (principally airports and airfields) where they were based. In effect, the DRC claims that Ugandan "occupation" of the entire northern and eastern portions of the Congo was accomplished by the mere presence of Ugandan troops in some of the locations in these regions. But military "presence" and "control" are very different things. Congolese history proves the point. During the regime of President Mobutu in what was then Zaire, it is uncontested that at least six anti-Uganda armed bands maintained a conspicuous military

presence in eastern Congo. However, no party, including the DRC, argues that these armed bands exercised control over Congolese territory. Similarly, Uganda's troops were present in eastern Congo with consent during the Presidency of Laurent Kabila (at least until August 1998). Again, no party, including the DRC, argues that the UPDF controlled any parts of these areas of Congo during that period. Thus, one cannot conclude, without more, that Uganda's military presence after August 1998 made her an occupying force. The DRC still has to show actual "control," which it has not and cannot. The evidence included in or attached to the written pleadings (or referred to in the DRC's 6 May 2005 responses to the three Judges' questions) does not support such a claim.

6. The DRC tries to buttress her claim about a Ugandan "occupation" by arguing that Uganda controlled the MLC, and thus that the latter was an instrument of Uganda. This claim is untrue and unproven. The mere fact of limited, tactical cooperation, which Uganda has always acknowledged, is insufficient to show that the MLC was an agent of Uganda, especially with regard to the MLC's exercise of local administrative authority – pursuant to express authorisation by the parties to the Lusaka Agreement – in the areas of the Congo where it was the dominant power. (CR/8, pp. 30-31, paras. 38-39.) The DRC's argument about an indirect Ugandan occupation through the "illegitimate" instrumentality of the MLC is also out of place, not only in view of the status conferred on the MLC by the Lusaka Agreement, but also because of the "new political dispensation" agreed to via the "inter-Congolese dialogue" that made the MLC a co-equal member of the Transitional Government of National Unity in the DRC, with one of four Vice Presidencies, 94 of 500 members of the National Assembly, 22 of 120 Senatorial seats, and several major ministerial posts, including foreign affairs. (See Global and All-Inclusive Power Sharing Agreement (submitted to the Court on 16 Oct. 2003).)

7. Finally, Uganda notes that the DRC argues that the alleged Ugandan "occupation" only ended on 2 June 2003, the date the last Ugandan soldier was withdrawn from the Congo. Until that date, the DRC claims, the entire north and east of Congo was under Ugandan "occupation." Yet, it is uncontested that, between 1 January 2003 and 2 June 2003, Ugandan forces were present in the DRC only in and around Bunia, in the Ituri region of eastern Congo, close to the Ugandan border. The DRC does not explain how Uganda could have occupied all of northern and eastern Congo when her forces were confined to the Bunia area. Nor does the DRC explain how Uganda could have occupied all of northern and eastern Congo after 6 September 2002, the date of the Luanda Agreement, when Ugandan forces were expressly recognised as being only in Gbadolite, Beni and Bunia. In Uganda's 6 May 2005 response to Judge Kooijmans' question, she provided the precise locations of her military forces in the DRC on each of nine critical dates, between 1 August 1998 and 2 June 2003, based on the evidence presented to the Court. The DRC's response to Judge Vereschetin's question (as well as her response to Judge Kooijman's question, as shown below) ignores this evidence, and simply presumes that if Ugandan soldiers were anywhere in northern and eastern Congo, then they were everywhere, and all of northern and eastern Congo was "occupied" for the entire five-year period. This claim is plainly unsupportable. The DRC's advocates cannot arbitrarily extend Uganda's "presence" beyond where the evidence establishes it to have been; and they cannot, in the absence of evidence, arbitrarily convert mere "presence" into the very different concept of "occupation."

II. Uganda's Observations on the DRC's Response to the Question of Judge Kooijmans

8. The concept of a Ugandan "occupation" of Congo also figures prominently in the DRC's 6 May 2005 response to Judge Kooijmans' question. Rather than repeat the comments made on the subject in paragraphs 3 through 7, above, Uganda simply incorporates them by reference here.

9. Uganda further observes that the sequence of events set forth in the DRC's response to Judge Kooijman's is rife with errors, and statements unsupported by any evidence. The DRC is thus not correct when she states: "Le prise de ces localités n'a pas été contestée par l'Ouganda."[1] In the first instance, several of the places listed in the DRC's 6 May 2005 response were not seized or even traversed by Ugandan forces as part of "Operation Safe Haven." For example, contrary to the DRC's assertion, Uganda was never present in Kindu in Mainema Province, a fact confirmed by the Operation Safe Haven document the DRC presented as evidence at the oral proceedings listing the villages, towns and cities Ugandan forces captured or passed through on her way to other locales during the course of her military presence in the DRC. (DRC Judges' Folder, Tab 40.).[2]

10. Other errors in the DRC's sequence of events are chronological. For example, Ugandan forces arrived at Aketi on 6 October 1998, *not* 8 November; they came to Businga on 20 December 1998, *not* early February 1999; and they entered Gemena on 25 December 1998, *not* 10 July 1999. (See DRC Judges' Folder, Tab 40.) Finally, the true circumstances of the fighting after the Lusaka Agreement was signed in July 1999 must be noted. In each case, the locality mentioned was controlled by the MLC on the date of the Lusaka Agreement. In breach of its obligations under the Agreement, the FAC (the Congolese Armed Forces) launched unprovoked offensives seeking to re-take positions previously won by the MLC, so that the DRC government would be in control of them at the time of agreement on disengagement of forces, which was then being negotiated. The MLC, with some limited Ugandan assistance, repulsed those attacks and reassumed control over the relevant towns. (CR 2005/14, p. 47, para. 34; see also DRC Reply, Annex 29, paras. 22-23.) Thus, the DRC is mistaken in alleging that Ugandan forces initiated offensives against Zongo, Basankusu, Bomongo, Moboza, Dongo, Buburu, and Mobenzene after the date of the Lusaka Agreement. (Indeed, as indicated below, there is no evidence that Ugandan forces were ever in Mobenzene, Buburu, Bomongo, and Moboza at any time.)

11. Uganda objects strongly to the DRC's attempt to rely, in her response to Judge Kooijman's question, on the maps included in her Judges' Folders as if they were evidence in this case. They are not. These maps – specifically those located at tabs 3 and 18, and cited in the DRC's 6 May 2005 response to Judge Kooijmans' question – were not included in the DRC's written pleadings; nor were they presented to the Court at any time prior to the commencement of the oral proceedings. They are mere graphic aids, not evidence that is part of the record of this case. Moreover, as Uganda pointed out during the oral proceedings, they are plagued by numerous errors, and depict Ugandan forces as being in particular locations in the DRC notwithstanding the fact that there is absolutely no credible *evidence* in or attached to the written pleadings that would place them at such locations, including Mobenzene,

[1] "Uganda has not disputed the seizure of these towns."

[2] In her Reply, the DRC first devoted considerable energy in an attempt to establish UPDF participation in the seizure of Kindu in October 1998. (Reply, paras. 2.49-2.53.) In her Rejoinder, Uganda showed that she did not. (Rejoinder, paras. 145-151.)

Buburu, Bomongo, and Moboza, among others. Uganda specifically objected to the DRC's use of these particular maps at the oral proceedings. (CR 2005/14, p. 47, para. 35.)

12. Uganda also takes exception to the DRC's misconstruction and misuse of the Harare Disengagement Agreement and the map incorporated therein, when the DRC argues: "Le plan de Harare, notamment, marque bien que l'UPDF et le MLC sont désignés comme occupants conjoints de la zone 1."[3] This interpretation of the Harare Disengagement Agreement is both novel and erroneous. Nowhere does the Harare Agreement use the words "occupation" or "joint occupation" or infer that such a state of affairs existed. The Agreement neither joined the UPDF and the MLC together, nor distinguished between them. Its purpose was to separate the *contending* forces by having them retreat beyond certain agreed disengagement lines. Thus, it was not necessary to distinguish between the MLC and UPDF on the one hand, or between the FAC and its allies on the other. What was important was to separate the MLC and UPDF from the FAC and its allies. This is what the Harare Agreement accomplished. It is a gross distortion of the Agreement to claim, as the DRC's advocates now attempt to do, that it somehow identified Ugandan forces as being present *throughout* Area 1. In fact, as Uganda has repeatedly reiterated, the MLC troops far outnumbered the UPDF forces, and covered the entire area. In contrast, Ugandan troops were confined to the eastern border region of the DRC and to several strategic locations, especially airports and airfields. (CR 2005/14, p. 46, para. 31.) As set forth in Uganda's written and oral pleadings, and in her 6 May 2005 response to Judge Kooijmans' question, the locations of Uganda's military forces in the DRC did not remain fixed throughout the entire period from August 1998 to June 2003. Uganda's 6 May 2005 response identified the locations of her military forces in the Congo as of nine critical dates between 1 August 1998 and 2 June 2003, and depicted them on the nine maps attached to Uganda's response, which plainly showed that Ugandan forces were insufficient both in number and location to have "occupied" vast regions of the DRC.

[3] "The Harare Plan, in particular, specifies that the UPDF and MLC are both occupiers of Area 1."

III. Uganda's Observations on the DRC's Response to the Question of Judge Elaraby

13. In her response to Judge Elaraby's question concerning the Lusaka Agreement, the DRC states: "La République démocratique du Congo a, depuis le début de la présente procédure, toujours interprété l'accord cessez le feu de Lusaka de la même manière."[4] But, as Uganda has demonstrated, the opposite is true. In reality, and especially during the oral proceedings, Congo continually altered her argument in a vain effort to come up with a colourable theory as to why the Lusaka Agreement did not authorise Uganda's presence in the DRC after July 1999. (CR 2005/14, p. 41, para. 13.) Her response to Judge Elaraby's question continues that strained effort to find a defensible position with respect to that Agreement.

14. In her latest argument on this subject, the DRC states that the Lusaka Agreement cannot be deemed a manifestation of her consent to the presence of Ugandan military forces in her territory because it was "obtenue sous la contrainte."[5] This is a remarkable argument both because it is not only unsupported in the written record, but does not even appear there! In neither the Memorial nor the Reply did the DRC even advert to duress as an element vitiating its consent. (Memorial, paras. 5.76-5.87; Reply, paras. 3.211-3.218.) Likewise, in her first round oral presentation on the subject of consent, the concept of duress did not appear. (CR 2005/4.) Only in Professor Klein's second round speech was the notion of duress invoked for the first time, and only then *en passant*. (CR 2005/14, p. 31, para. 24.) It cannot be a serious legal argument, not only because of the extreme lateness of its appearance, but also because there is no factual basis – or evidence of any kind – in the written pleadings or the annexes thereto that would support it. The fact that it has now become the centrepiece of the DRC's response to Judge Elaraby's question is, above all, an indication of the DRC's inability to devise an effective rebuttal to Uganda's thorough textual and historical analysis of the Lusaka Agreement proving that it authorises Uganda's military presence in the DRC from 10 July 1999 through 2 June 2003. (CR 2005/8, pp. 16-36; 2005/14, pp. 37-51.)

15. Uganda further observes that, in her response to Judge Elaraby's question, the DRC once again invokes the Court's *procedural* ruling rejecting the admissibility of Uganda's third counter-claim relating to the DRC's violations of the Lusaka Agreement. The DRC claims that this ruling somehow precludes Uganda from relying on the Agreement as part of its *substantive* defence. Uganda has already addressed the shortcomings of this argument and will not repeat here what she said previously. Instead, Uganda respectfully refers the Court to the Rejoinder (at Paragraphs 225-26) and to the verbatim record of the oral proceedings (at CR 2005/14, p. 45, para. 26). By way of underscoring the point, however, the difference between Uganda relying on the Lusaka Agreement as the source of an *affirmative claim* and her relying on it as part of a *defence* to the DRC's claim must be emphasised.

16. The Court will recall that it declined jurisdiction over Uganda's counter-claim in part because the Parties were not pursuing the same legal aims. (Counter-claims Order, para. 42.) While the DRC sought to hold Uganda accountable for the wrongful use of force

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[4] "Since the beginning of these proceedings, the Democratic Republic of Congo has not changed its interpretation of the Lusaka Cease-fire Agreement."

[5] "obtained under duress"

and for intervention in her internal affairs, Uganda sought to hold the DRC accountable for specific violations of treaty-based obligations. (Ibid.) It is thus apparent why the Court would find that these two claims were not directly connected within the meaning of Article 80. However, Uganda's invocation of the Lusaka Agreement as a defence to the DRC's claims is an altogether different matter. The DRC claims that Uganda was unlawfully present in the DRC until 2 June 2003. Uganda claims that her presence was authorised, *inter alia*, by the Lusaka Agreement, and therefore could not have been unlawful, at least between 10 July 1999 and 2 June 2003. The DRC's claim and Uganda's defence are directly connected, and nothing in the Court's Order concerning the admissibility of Uganda's counter-claims affects that. Indeed, Uganda notes that in Paragraph 46 of its Order, the Court specifically stated: "Whereas a decision given on the admissibility of a counter-claim taking account of the requirements of Article 80 of the Rules of Court *in no way prejudges any question* with which the Court would have to deal during the remainder of the proceedings."

17. Uganda notes, as well, that the DRC once again invokes Security Council Resolution 1234 for its proposition that the Lusaka Agreement draws a distinction between "invited" and "uninvited" foreign forces, and thus presumably that the provisions thereof should be interpreted differently with respect to each. This argument is untenable for at least two dispositive reasons. One, the resolution is dated April 1999, three months *prior* to the Lusaka Agreement. It thus can shed little light on proper interpretation of the later Agreement. Two, the plain terms of the Agreement make no distinction among the various foreign forces present in the DRC. To the contrary, the Agreement is consistent in its reference to "*all* foreign forces." (See, e.g., Lusaka Agreement, Art. III, para. 12; Annex A, Chs. 4 & 11.) In fact, this is recognised in a series of Security Council resolutions that postdate the Agreement, including Resolutions 1265, 1273, 1279, 1291, 1296, 1304, 1323, and 1332. It is significant that the only Security Council resolution cited by the DRC is the one that predates the Lusaka Agreement; all of the rest are deliberately ignored. There is plainly no basis for the DRC's suggestion that the Lusaka Agreement's authorisation for foreign forces to remain in the DRC operated differently for Uganda than for any other foreign forces.

18. Finally, Uganda observes that the DRC has never, in any of her written or oral pleadings (at least from the beginning of this case through 6 May 2005), attempted to refute Uganda's argument that the parties to the Lusaka Agreement repeatedly extended, by mutual agreement, the time period for the withdrawal of foreign military forces from Congolese territory beyond the original period of 180 days projected in Annex B to the Agreement. (Uganda's position, in this regard, is summarised in her 6 May 2005 response to Judge Elaraby's question). Rather, the DRC has always adopted an "all or nothing" approach to the Lusaka Agreement; she has argued that there could not have been any extensions because there was never agreement to allow "uninvited" foreign military forces to remain on Congolese territory for *any* period of time, not even 180 days. As Uganda has shown in her written and oral pleadings, including her response to Judge Elaraby's question, the DRC's argument is unsupported by the evidence in this case, including the plain meaning of the Lusaka Agreement, and is completely unsustainable. Given that the Agreement plainly authorises Ugandan troops to remain in Congolese territory, the DRC has no effective response whatsoever to Uganda's demonstration that the time period was extended, by mutual agreement of the parties, beyond 180 days until Ugandan forces were fully and finally withdrawn from the DRC on 2 June 2003.