CONGO CASE

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I) INTRODUCTION: “AFRICA'S WORLD WAR”

The Congo Free State was created by a conference held in Berlin in 1884-85. The borders and the political regime of the Congo Free State were determined in Article 1 of the General Act of the Berlin Conference on West Africa, 26 February 1885. These borders have since created various very deep problems among African peoples. Unlike other regions, Africa has wide variety of ethnic groups. In the Democratic Republic of Congo alone, '[a]s many as 250 ethnic groups have been distinguished and named.' The division of Africa without taking this variety into account has caused ethnic conflicts for decades. Secondly, natural resources have also given rise to conflict. In particular, '[a]fter independence in 1960, the country immediately faced an army mutiny and an attempt at secession by its mineral-rich province of Katanga.'

It is becoming increasingly difficult to ignore the importance of the components of these conflicts. As time has passed, non-state actors have increasingly become involved in these ‘armed conflicts’. In particular, after the Cold War era, the changing conjuncture of international relations should be taken into consideration by legal organs. However, these rapid changes are having a serious effect on the traditional understanding of ‘armed conflicts’. This essay seeks to remedy these problems by analysing the case concerning Armed Activities on the Territory of the Congo and tries to examine the legal basis of self-defence

1Democratic Republic of Congo Profile, available at, http://www.bbc.co.uk/news/world-africa-13283212, accessed date, 11.03.2012. “Since the conflict began in 1994, it has directly involved on different sides, the armies of DRC (formerly Zaire) Uganda, Rwanda, Burundi, Zimbabwe and Namibia. Three other States (Angola, Sudan and Chad) have also been indirectly involved. No less than 21 other armed groups have also taken part in the conflict as combatants.” Okowa, P. N. (2006). “II. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda).” International and Comparative Law Quarterly55(03): 742-753.p.743.
by applying the views of various scholars. The objectives of this research are to determine whether or not the ICJ judgement was adequate in the field of international law.

This paper first gives a brief overview of the recent background of the conflict emerged on the territory of the Congo and will then go on to enlighten the DRC’s claims and Uganda’s counter-claims. The bulk of this essay will be constructed on the Court’s decision on self-defence. These findings will then be analysed in the light of various scholars’ writings.

II) BACKGROUND OF THE CONFLICT

‘In 1965 Mobutu seized power, later renaming the country Zaire and himself Mobutu SesseSeko.’ 6 Mobutu monopolized power in the country until 1997; during this period of time, he tried to establish the new economy politics. In light of this new approach, ‘many small businesses owned by foreigners were nationalized and given to new Zairian proprietors.’ 7 This state-centralized economy later led to both economic and political corruption in the country. After the Cold War era, the changing environment in world politics forced Mobutu to move toward democratization. In addition to the world’s opinion, the economy of the DRC(Zaire) was on the brink of collapse. 8 The situation in the DRC(Zaire) created a chaotic atmosphere.

The Congo War was one of the most brutal since World War II. 9 In 1996, Rwanda and Uganda’s direct involvement in Zaire gave support to ‘Congolese rebel group Alliance of Democratic Forces for the Liberation of the Congo (ADFL) under the leadership of Laurent Kabila.’ 10 With this support, Kabila found the opportunity to overthrow the Mobutu’s

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7 Tatulli, op.cit., p.905.
8 Ibid.
9 According to some sources, it is estimated that almost 50 million people were affected. See http://www.globalsecurity.org/military/world/war/congo.htm, accessed date, 15.03.2012.
10 Okowa, op.cit., p.743.
government, which has been called a ‘dictatorial regime’ by some writers. Since 1997, Zaire has been called the Democratic Republic of Congo.

However, replacing the government in the DRC did not actually stabilize conditions. In this sense, new problematic areas came to the surface between new government and particularly Uganda and Rwanda. For instance, it is alleged that not only did Rwandan troops commit grave human rights violation in the territory of the DRC, but that Congolese rebel groups who were supported by Rwanda also did. In this frame, the DRC filed an application against Rwanda to the ICJ in 2002. The application accused Rwanda of involvement in ‘massive, serious and flagrant violations of human rights and of international humanitarian law.’ However, the court determined that it had no jurisdiction over Rwanda because of the fact that it was not party to various international treaties.

However, on the other hand, Rwanda were not the only side committing atrocities in the territory of the DRC. In this line, the DRC instituted proceedings against Belgium in 2002 and another case was brought to the ICJ against Burundi in 1999. However, the only proceedings that the ICJ gave a legal decision on were those against Uganda.

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13 Ibid., pp.495-496.
III) THE CONTENT OF THE CASE

a) The DRC’s Claims:

The key aspects of the claims made by the DRC can be listed as follows; firstly, the DRC requested the Court to declare that Uganda was involved in grave violations of conventional and customary international law as Uganda had invaded the DRC’s territory using its own troops. It is asserted that Uganda occupied a third of the DRC. Furthermore, the DRC set forth that ‘Uganda had committed acts of armed aggression and had supported rebel groups (the Congo Liberation Movement … and the Congolese Rally for Democracy) in operations aimed at destabilizing the Congo.’

Uganda’s involvement in human rights violations was given as a second claim of the DRC. According to this, Uganda was accused of not obeying conventional and customary international law in its killing and injuring of DRC’s nationals or despoiling them of their property. The distinction between civilians and military objectives in respect to armed conflicts was not taken into consideration by Uganda. In doing so, Uganda failed to comply with its obligations in accordance with conventional and customary international law. It is also declared by the DRC that Uganda violated its obligations to respect fundamental human rights in accordance with international humanitarian law.

In addition to the above claims, ‘the case against Uganda also raised… the legal framework governing the exploitation of natural resources outside the context of decolonization.’ Moreover, it is alleged that Uganda did not follow international law with regard to the sovereignty of States, including over their natural resources.

17 Congo Case, paragraph 25(1).
18 Congo Case, paragraph 107.
20 Congo Case, paragraph 25(2).
21 Okowa, op.cit., p.744.
22 Congo Case, paragraph 25(3).
b) Uganda’s Counter Claims:

Uganda asserted that the DRC had violated its obligation under the UN Charter article 2(4) by being in violation of bilateral agreement called the Lusaka Agreement. Between 1994 and 1997 Uganda was the victim of armed attacks from Congo’s territory. It also alleged that the DRC was in violation of the articles 79-80 of the Rules of Court.\(^{23}\) According to Uganda;

> ‘He (Mobutu) rejected calls by the new government in Rwanda, echoed by Uganda and most of the international community, to deliver the leading perpetrators of the genocide for trial by the United Nations-established International Criminal Tribunal by Rwanda’\(^{24}\)

Moreover, Uganda insisted that the DRC had consented to Uganda’s presence in the territory of the DRC until 11 September 1998.\(^{25}\) Before that day, Uganda’s troops presence was justified by the DRC’s consent; however, how can Uganda’s presence in the territory of the DRC be justified after that date under international law? In answer to this, ‘Uganda acknowledges that its military operations thereafter can only be justified by reference to an entitlement to act in self-defence.’\(^{26}\)

It is essential to look at Uganda’s counter-memorial, which was submitted on 21 April 2001, in order to examine Uganda’s will under international law. According to Uganda;

> ‘President Kabila recognised that the Congolese army would not be able to shut down anti-Uganda insurgent activity completely, because it did not have human or material resources to control such a vast country, and especially its remote eastern province. Accordingly, to fill this vacuum, eliminate the anti-Uganda insurgents … and secure the border region, President Kabila, … invited Uganda to deploy its own troops in eastern Congo.’\(^{27}\)


\(^{26}\) *Congo Case*, paragraph 108.

\(^{27}\) *Counter-Memorial*, paragraph 31.
On 28 July 1998, President Kabila called for the withdrawal of foreign troops from Congolese territory.\textsuperscript{28} Uganda insisted that this call for withdrawal of foreign troops was addressed to Rwanda, not Uganda.\textsuperscript{29} Moreover, until the Lusaka Ceasefire was agreed, Uganda justified its presence upon self-defence. The Lusaka Agreement was constituted on 10 July 1999; after that day Uganda tried to justify its presence in accordance with this ceasefire. According to the ceasefire agreement;

\[ \text{‘Thus, the parties to the Lusaka Agreement expressly agreed that foreign forces would remain in their positions in Congo until, inter alia: the conclusion of the national dialogue and the establishment of new Congolese institutions; and, especially, the disarmament of armed groups. Until the occurrence of these ‘Major Ceasefire Events,’ all foreign forces were directed to ‘remain’ in their ‘declared and recorded locations’’} \textsuperscript{30} \]

In this frame, the Court tried to find answers to the various claims and counter-claims, but it was a tough task for the Court to determine whether Uganda’s actions could be defined as self-defence or not.

\textsuperscript{28}Congo Case, paragraph 30.  
\textsuperscript{29}Okowa, op.cit., p.745.  
\textsuperscript{30}Counter-Memorial, paragraph 74.
IV) COURT’S JUDGMENT AND SELF-DEFENCE

a) Judgment:

The Court, first determined whether Uganda violated its obligations derived from international law by applying specific time frames. Using this approach, the military issues can be classified into three periods of time. First, the legality of Uganda’s presence before 1998 when president Kabila gave a speech about the withdrawal of foreign military troops from the territory of the DRC was examined. The next period was between 1998 to 1999, which is another significant time frame for determining whether Uganda’s claims of self-defence are legal or not. The final period was after 1999 when the Lusaka Ceasefire Agreement was adopted, and the Court examined the ceasefire agreement to see whether it created a legal basis for Uganda’s troops.

Firstly, it is clear from the materials put before the Court that in the period proceeding August 1998 the DRC did not object to Uganda’s military presence and activities in its eastern border area. The consent of the DRC was valid at that period and Uganda was invited to fight against rebel groups in order to stabilize and secure the eastern border of the DRC.

However, on 28 July 1998 president Kabila made an official announcement asking foreign troops to withdraw. Although Uganda believed that this official statement was directed at Rwandan troops, the Court did not share the same interpretation. According to Kabila’s statement:

‘Through these military forces (Rwandan Military Forces), he would like to thank all of the Rwandan people for the solidarity they have demonstrated to date. He would also like to congratulate the democratic Congolese people on their generosity of spirit for

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31 Congo Case, paragraph 45.
32 “Uganda asserts that upon assuming power on 29 May 1997, President Kabila invited Uganda to deploy its own troops in eastern Congo in view of the fact that the Congolese army did not have the resources to control the remote eastern provinces, and in order to “eliminate” the anti-Ugandan insurgents operating in that zone and to secure the border region.” See, Congo Case, paragraph 36.
having tolerated, provided shelter for and trained these friendly forces during their stay in our country. This marks the end of the presence of all foreign military forces in the Congo." (Information and emphasis added)

Although, Uganda understood this statement as being directed at Rwanda, the ICJ determined that ‘as to the content of President Kabila’s statement, ..., as a purely textual matter, the statement was ambiguous.’ Moreover, the Court addressed that ‘any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998, i.e. the closing date of the Victoria Falls Summit.’

Before examining the Court’s findings about the legality of self-defence, it must be determined whether the Lusaka Agreement gave a legal basis for Uganda’s presence or not. First of all, ‘the Court noted that there was nothing in the provisions of the Lusaka Agreement and the related instruments that could be interpreted as an affirmation that the security interests of Uganda required its presence on Congolese territory on a continuing basis.’ In line with this, the Court constituted that this cease-fire agreement does not contain ‘consent’ for Uganda to keep its troops on the territory of Congo. Furthermore, ‘it confines itself to providing that “[t]he final withdrawal of all foreign forces from the national territory of the DRC shall be carried out in accordance with the Calendar in Annex ‘B’ of this Agreement...”’ In addition to this finding, both the Court and the UN Security Council affirmed that this agreement contained political and security elements.

33Congo Case, paragraph 49.
34Congo Case, paragraph 51.
35Congo Case, paragraph 53.
36Okowa, op.cit., p.746.
37Congo Case, paragraph 95.
38Congo Case, paragraph 100. And also see, “4. Calls for the immediate signing of a ceasefire agreement allowing the orderly withdrawal of all foreign forces, the re-establishment of the authority of the Government of the Democratic Republic of the Congo throughout its territory, and the disarmament of non-governmental armed groups in the Democratic Republic of the Congo, and stresses, in the context of a lasting peaceful settlement, the need for the engagement of all Congolese in an all-inclusive process of political dialogue with a view to achieving national reconciliation and to the holding on an early date of democratic, free and fair elections, and for the provision of arrangements for security along the relevant international borders of the
As a consequence, the Lusaka Agreement is a cease-fire agreement and does not provide a legal basis for Uganda’s presence on the territory of Congo. Moreover, the delay of the withdrawal of the troops of Uganda did not make any alteration to the legal basis of the presence of Uganda. For instance, ‘The Luanda Agreement, a bilateral agreement between the DRC and Uganda…alters the terms of the multilateral Lusaka Agreement.’\textsuperscript{39} This means that the withdrawal of the troops of Uganda would be organized by applying this agreement.

\textbf{b) Self-Defence:}

\textbf{b.1) The Court Findings On Self-Defence}

The Court, first visited the Ugandan High Command document in order to make Uganda’s claims about self-defence clear.\textsuperscript{40} Dealing with this document, the Court found ‘that the objectives of operation “Safe Haven”… were not consonant with the concept of self-defence as understood in international law.’\textsuperscript{41} It was mentioned in the Ugandan High Command document that both the DRC and Sudan were involved in the conflict by supplying anti-Ugandan rebels. In this frame, the Court tried to ascertain whether Sudan and the DRC were involved into these actions or not.\textsuperscript{42} The Court disagreed with Uganda’s claims and adjudged that there was no evidence proving that ‘there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda;’ furthermore ‘any action by the Sudan … was of such a character as to justify Uganda’s claim that it was acting in self-defence.’\textsuperscript{43} As a consequence, the Court was not satisfied by the evidence demonstrated in order to link the DRC and Sudan’s governments with non-state actors.

Furthermore, the Court cited the UN Charter Article 51 to determine whether Uganda fulfilled its obligations or not. By doing so, ‘(t)he Court has already found that the military

\textsuperscript{39} \textit{Congo Case}, paragraph 102.
\textsuperscript{40} \textit{Congo Case}, paragraph 109.
\textsuperscript{41} \textit{Congo Case}, paragraph 119.
\textsuperscript{42} \textit{Congo Case}, paragraph 120.
\textsuperscript{43} \textit{Congo Case}, paragraph 130.
operations of August in Beni, Bunia and Watsa, and of 1 September at Kisangani…" which were done by Uganda, should be examined in the light of self-defence, according to the UN Charter 51. The Court observed’ that in August and early September1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.’

The Court put forward that Uganda had not suffered from an armed attack from any of DRC’s military entities. Furthermore, the Court applied Article 3 (g) of General Assembly resolution 3314 (XXIX) to determine whether acts of rebel groups could be defined as armed attack or not on respect of aggression. Finally, without taking into consideration rebel groups’ acts as armed attacks, the Court stated that ‘even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.’

The concept of ‘necessity’ and ‘proportionality’ are established as criteria in customary international law under the law of armed conflict. As Okimoto mentioned, ‘the principle of proportionality in self-defense imposes certain limits on the selection of targets, effects on civilians and geographical and temporal extent of self-defense measures.’ In its judgement, the Court affirmed that the acts of Uganda did not comply with ‘necessity’ and ‘proportionality’. As the Court stated that; “The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda’s border would

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44 Congo Case, paragraph 144.
45 Congo Case, paragraph 145.
46 Article 3(g) defines that, ‘The sending by or on behalf of a State of armed bands, groups, irregular 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.’(emphasize added) See, General Assembly Resolution 3314 (XXIX), 14 December 1974, available at, http://www.un.org/Depts/dhl/resguide/r29.htm, accessed date, 23.03.2012.
47 Congo Case, paragraph 146.
48 Ibid.
50 Ibid.,pp.57-58.
51 Congo Case, paragraph 147.
not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.” 52 These two criteria also were reaffirmed in court’s previous judgements.53

b.2) The Concept of Armed Attack and Self-Defence in Doctrine

According to the UN Charter Article 51, if a state wants to enjoy its inherent right of self-defence, there has to have been an armed attack against it.54 Two questions must therefore be asked; first what is an ‘armed attack’? And who has the ability to commit ‘armed attack’?

According to Barbour and Salzman, however, the definition of an armed attack is a blurred area; the Court therefore had to determine the criteria for the concept of an armed attack. Furthermore, ‘the Court has defined the concept as both quantitative and as qualitative.’55 It was found in the Nicaragua Case that ‘scale and effect’ are the quantitative measures.56 ‘The Court also suggested that a series of small attacks by irregular forces can collectively amount to an armed attack.’57 Moreover, according Okimoto, the term ‘armed attack’ can be defined in three ways. Firstly, there should be ‘an attack from a State, including from an armed group acting on behalf of a State…’; secondly, ‘an armed attack is normally launched across the international border’; and finally, to constitute an armed attack ‘a certain intensity is required.’58

52 Ibid.
55 Barbour and Salzman, op.cit., p.65.
57 Barbour and Salzman, op.cit., p.65.
58 Okimoto, op.cit., pp.60-61.
Kammerhofer creates two categories to underline the entities that can commit ‘armed attack’. According to him, the first group is the minority in that ‘an armed attack in the sense employed by Article 51 can be committed by private actors, because Article 51 plainly does not speak of an armed attack by a state, only of an armed attack without specifying who must be the perpetrator of the attack’.\textsuperscript{59} For instance, the UN Security Council Resolution 1368 repeats the individual or collective inherent right of self-defence to respond to terrorist acts.\textsuperscript{60} By saying this, the UN Security Council determined that private actors’ acts can be classified as armed attacks. In his dissenting opinion, Judge Kateka criticized the findings of the Court. According to him, ‘it has not elaborated as to whether Uganda was entitled to the use of force on a threshold below “armed attack”.’\textsuperscript{61}

Moreover, scholars have continued to argue the characteristics of armed attacks. According to Steenberghe ‘there are different ways in which recent state practice may be interpreted in relation to the question of whether attacks by non-state actors may trigger the victim state’s right of self-defence.’\textsuperscript{62}

He argues that ‘the law of self-defence is still to be conceived in its classical meaning’. This means ‘allowing states to act in self-defence only in response to an armed attack by another state’ or ‘a non-state actors in which this state is, at least, substantially involved.’\textsuperscript{63} In addition to this, the author adds that an armed attack from a non-state actor whose acts can be


\textsuperscript{60} The UN Security Council Resolution 1368, 12 September 2011, available at, \url{http://www.un.org/Docs/scres/2001/sc2001.htm}, accessed date, 22.03.2012. ‘Determined to combat by all means threats to international peace and security caused by terrorist acts, Recognizing the inherent right of individual or collective self-defence in accordance with the Charter.’


\textsuperscript{63} \textit{Ibid.}
attributable to a state can be given as the second interpretation of self-defence.\textsuperscript{64} The final interpretation of self-defence is that an armed attack can be made by a non-state actor and there is no need for this non-state actor to be attributed a state under the UN Charter Article 51.\textsuperscript{65}

For instance, Ronzitti argues that there are two possible interpretations of self-defence in accordance with an armed attack. Mainly discussing anticipatory self-defence, the author mentioned that under one school of thought the inherent right of self-defence can be enjoyed not only when the state has been the target of an armed attack, but also when the armed attack is imminent.\textsuperscript{66} Conversely, ‘self-defence could lawfully be exercised only if the State is the object of an actual attack and points out the danger contained in the notion of anticipatory self-defence.’\textsuperscript{67} In this frame, the Court lost the opportunity to determine whether anticipatory self-defence is legal or not while dealing with the armed activities on the territory of Congo.

The changing environment of international actors affects international law as well. Strictly following the traditional approach towards the UN Charter Article 51 can cause a vacuum in the area of armed conflicts. Particularly after the events occurred in 11 September, state sovereignty and state consent have become a problematic area. As Somer mentioned, ‘the problem is that attacking a non-state actor will almost inevitably require military operations on the sovereign territory of a State.’\textsuperscript{68} If a state tries to enjoy its inherent right of self-defence against a non-state actor it will have to use military actions against a sovereign state. Therefore, under international law there would be a clash of norms. Using the inherent right of self-defence would violate the principles of state consent and sovereignty.\textsuperscript{69}

\textsuperscript{64}Ibid., p.194.
\textsuperscript{65} Ibid., p.197.
\textsuperscript{67}Ibid., p.345.
\textsuperscript{69} Ibid.
Moreover, Rosalyn Higgins elaborates on the issue of ‘test of attribution’ in the concept of state responsibility. She compares two cases which have a similar context using the Tadic case\(^{70}\) in which, according to her, ‘two tribunals interpreted the same norm differently.’\(^{71}\) Moreover, she discusses the ‘effective test’, which was opted for in the Tadic case, for the purpose of indicating state responsibility. However, the obligation to link irregular forces to states keeps some pitfalls under the law of armed conflicts. The question therefore remains: how can an inherent right to self-defence be enjoyed against non-state actors who are not attributable to a state?


\(^{71}\) Ibid., p.794.
V) CONCLUSION

This assignment has explained the central importance of self-defence within the law of armed conflicts. In order to do so, this project analysed the Congo Case on self-defence and evaluate it by applying the views of various scholars and the ICJ’s previous decisions. Finally, a number of important limitations need to be considered.

First, the Court failed to comply with the changing environment of international relations and its effects on international law. In particular, after the Cold War era, the nature of armed conflicts has changed rapidly and new instruments have started being used in armed conflicts, such as terrorist organizations and modern private security companies. In this respect, the ICJ and traditional decision makers of international law are faced with a dilemma. Should international law maintain its state-central position or not? The Court therefore missed the opportunity to give a new understanding to international law in the law of armed conflicts. In his separate opinion, Judge Simma pointed out that;

‘if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State’, and, further, that it ‘would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require’.

In addition to this, the Court also did not deal with anticipatory self-defence which is still a problematic and debatable area of international law. As a consequence, international law should conform to the new developments in the world order.

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74 The Court’s approach to the issue of anticipatory self-defence raised an impression that the Court tried not to get involved in this area. The Court ‘recalls that Uganda has insisted in this case that operation “Safe Haven” was not a use of force against an anticipated attack.’ Moreover, ‘The Court there found that “[a]ccordingly [it] expresses no view on that issue’. Congo Case, paragraph 143.
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