

**ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO
(Congo v Uganda)
Order on Counter-Claims***

I. BACKGROUND¹

On 29 November 2001, the Court handed down an Order that related to Uganda's counter-claims in the case concerning the Congo's claims against it. The Order held that two of Uganda's counter-claims were admissible while the third was not.²

On 23 June 1999 the Congo had instituted proceedings against Uganda in the Court alleging Uganda's armed aggression on the Congo's territory in flagrant violation of the Charters of the United Nations and the Organisation of African Unity. The Congo based the Court's jurisdiction on the declarations of the Congo and Uganda (the parties) under Article 36(2) of the Court's Statute and requested the Court to adjudge and declare:³

1. Uganda was guilty of an act of aggression by violating Article 1 of United Nations General Assembly Resolution 3314 of 14 December 1974 and Article 2(4) of the United Nations Charter.
2. Uganda was repeatedly violating the 1949 Geneva Conventions and the 1977 Additional Protocols flagrantly disregarding the elementary rules of international humanitarian law in conflict zones. It was also guilty of massive human rights violations under basic customary law.
3. More specifically, by forcibly taking the Inga hydroelectric dam and deliberately and regularly causing massive electrical power cuts in violation of Article 56 of the 1977 Additional Protocol, Uganda became responsible for very heavy losses of life among the 5 million inhabitants of Kinshasa city and the surrounds.

* [2001] ICJ Reports (forthcoming). For a summary of the Judgment see ICJ, Press Release 2001/36 at <www.icj-cij.org/> (visited December 2001).

¹ For more information refer [2000] Australian International Law Journal 328-348.

² ICJ, Press Release 2001/36 at <www.icj-cij.org/> (visited December 2001).

³ See Order of the Court para 1.

4. By shooting down a Congo Airlines Boeing 727 on 9 October 1998 at Kindu killing 40 civilians, Uganda violated the Chicago Convention on International Civil Aviation Convention 1944, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 and the Montreal Convention Suppression of Unlawful Acts against the Safety of Civil Aviation 1970.

Based on the above international legal obligations, the Congo requested the Court to adjudge and declare:⁴

1. All Ugandan armed forces participating in acts of aggression should forthwith vacate Congo territory.
2. Uganda should immediately and unconditionally withdraw from the territory belonging to Congo nationals, natural or otherwise.
3. Uganda should compensate the Congo for all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, and the Congo reserved the right to determine later the precise amount of the damage suffered, including the restitution of property removed.

Following the Congo's request on 19 June 2000, the Court indicated provisional measures under Article 41 of its Statute by Order dated 1 July 2000.⁵ On 19 July 2000, the Congo filed its Memorial submitting that, while reserving the right to supplement or modify its submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the dispute, it requested the Court to adjudge and declare:⁶

1. Uganda, by engaging in military and paramilitary activities against the Congo, occupying its territory and actively extending military, logistic, economic and financial support to irregular forces operating there, violated the following principles of conventional and customary law:
 - the principle of non-use of force in international relations, including the prohibition of aggression;
 - the obligation to settle international disputes exclusively by peaceful means so as to ensure that international peace and

⁴ Ibid.

⁵ Ibid para 2.

⁶ Ibid para 3.

- security, as well as justice, were not jeopardised;
- respect for the sovereignty of States and the rights of peoples to self-determination and their right to choose their own political and economic system freely and without outside interference; and
 - the principle of non-interference the domestic affairs of States, including refraining from assisting the parties to a civil war operating in another State's territory.
2. By illegally exploiting the Congo's natural resources and pillaging its assets and wealth, Uganda violated the following principles of conventional and customary law:
- respect for the sovereignty of States, including over their natural resources;
 - the duty to promote the principle of equality of peoples and their right of self-determination, and to refrain from exposing peoples to foreign subjugation, domination or exploitation; and
 - the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters.
3. By committing acts of oppression against the Congolese nationals by killing, injuring, abducting or despoiling them, Uganda violated the following principles of conventional and customary law on:
- the obligation to respect and ensure respect for fundamental human rights, including in times of armed conflict; and
 - the Congolese nationals' entitlement to enjoy the most basic rights – civil, political, economic, social and cultural.
4. In light of the above violations, Uganda should:
- cease forthwith any continuing internationally wrongful act, particularly its occupation of Congolese territory, its support for irregular forces operating in the Congo, its unlawful detention of Congolese nationals and its exploitation of Congolese wealth and natural resources;
 - make reparation for all types of damage caused by all types of wrongful act attributable to it, no matter how remote the causal link between the acts and the damage caused;
 - make reparation in kind where this was physically possible, particularly the restitution of Congolese resources, assets or wealth still in its possession;

- failing this, furnish a sum covering the whole of the damage suffered;
- further, and in any event, render satisfaction for the insults it inflicted upon the Congo, by official apologies, the payment of damages reflecting the gravity of the infringements and the prosecution of all those responsible; and
- provide specific guarantees and assurances that it would never again in the future commit any of the above-mentioned violations against the Congo.

II. UGANDA'S COUNTER-CLAIM

On 20 April 2001, Uganda filed its Counter-Memorial where in Chapter XVIII it contended that for more than seven years it was the victim of the military operations and other destabilising activities of hostile armed groups either sponsored or tolerated by successive Congolese governments.⁷ Since the Congo had started proceedings, Uganda had to take appropriate steps to ensure that justice was done and the Congo's responsibility, caused by its policies, was recognised. Relying upon various principles of customary or general international law, Uganda asked the Court to adjudge and declare the Congo's responsibility for the following breaches of customary or general international law on the obligation to refrain from:⁸

1. using force against Uganda;
2. intervening in the internal affairs of Uganda; and
3. providing assistance to armed groups carrying out military or paramilitary activities in and against Uganda by training, arming, equipping, financing and supplying such armed groups.

Uganda also relied upon Article 2(4) of the United Nations Charter. Its Counter-Memorial provided specific examples of Congolese aggression including the attack on Uganda's Embassy, the inhumane treatment of its diplomatic personnel and nationals, and the Congo's violation of its obligations under the Lusaka Agreement. Finally, Uganda:

1. reserved its right to supplement or amend its requests;
2. requested the Court to uphold its counter-claims in accordance

⁷ Ibid para 4.

⁸ Ibid.

- with international law; and
3. reserved the issue of reparation in relation to the counter-claims for subsequent proceedings.⁹

III. THE COURT'S REASONING

The Court began by referring to Article 80 of its Rules on counter-claims and by considering whether Uganda's claims constituted 'counter-claims' as set out under this provision.¹⁰ It referred to its Order dated 17 December 1997 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*¹¹ where it stated that:¹²

a counter-claim has a dual character in relation to the claim of the other party; whereas a counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and, whereas at the same time, it is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it; whereas the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings – for example, that a finding be made against the Applicant; and, whereas in this respect, the counter-claim is distinguishable from a defence on the merits.

In the present case, Uganda's counter-claims sought the dismissal of the Congo's claims and a ruling on the Congo's responsibility, including reparations for its breach.¹³ Although the Congo did not deny that Uganda's claims fulfilled the 'jurisdictional' condition found in Article 80(1), it contended that Uganda's counter-claims were inadmissible because they did not fulfil the other conditions found in this provision.¹⁴

⁹ Ibid para 1.

¹⁰ Order of the Court para 28.

¹¹ [1997] ICJ Reports 256.

¹² Ibid para 27.

¹³ Order of the Court para 29.

¹⁴ Ibid para 30.

The Congo asserted as its principal argument that Uganda's claims were inadmissible as counter-claims because they did not satisfy the formal conditions found in Article 80(2).¹⁵ This provision provided that a "counter-claim shall be made in the Counter-Memorial of the party presenting it, and shall appear as part of the submissions of that party". However, Uganda's counter-claims had been set out in Chapter XVIII of its Counter-Memorial entitled *The State Responsibility Of The DRC And The Counter-Claims of the Republic of Uganda*.¹⁶ They referred to acts amounting to the Congo's violation of a number of international obligations *vis-à-vis* Uganda. Uganda had therefore in its Counter-Memorial requested the Court to adjudge and declare in accordance with international law, uphold its counter-claims found in Chapter XVIII of its Counter-Memorial and reserve the issue of reparation for a subsequent stage of the proceedings.¹⁷

On this point, the Court found that although Uganda's counter-claims could have been presented in a clearer manner, their presentation did not deviate from the requirements of Article 80(2) to such an extent that they should be held inadmissible.¹⁸ Further, Uganda could refer to a request for reparation without its modalities being stated at this stage. As a result, the Court denied the Congo's principal submission.¹⁹

The Congo contended in the alternative that "the claims concerning respectively the aggression alleged to have been committed by the Congolese State before May 1997, the alleged attacks on Ugandan diplomatic premises and personnel in Kinshasa and the alleged breaches of the Lusaka Agreements...d[id] not satisfy the condition of 'direct connection' laid down by [Article 80(1)]."²⁰ Since the Court agreed with this argument, it held Uganda's counter-claims inadmissible.²¹ However, the Court added that according to its jurisprudence, the admissibility of a counter-claim was contingent on the 'direct connection' set out in Article 80(1) where:

¹⁵ Ibid para 31.

¹⁶ Ibid para 32.

¹⁷ Ibid.

¹⁸ Ibid para 33.

¹⁹ Ibid.

²⁰ Ibid para 16.

²¹ Ibid para 34.

the Respondent cannot use [the counter-claim procedure] to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant's rights and of compromising the proper administration of justice.²²

The Court also referred to two of its earlier Orders in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Counter-Claims, Order of 17 December²³ and *Oil Platforms (Iran v United States)*, Counter-Claim, Order of 10 March 1998.²⁴

The Court held that although its Rules did not define the meaning of 'directly connected', it was for the Court to assess whether the counter-claim was sufficiently connected to the principal claim taking into account the particular aspects of each case. However, as a general rule, the necessary direct connection between the claims should be assessed both in fact and in law.²⁵ Further, it was appropriate for the Court to consider Uganda's three counter-claims under separate heads according to whether they referred to the Congo's:

1. alleged acts of aggression against Uganda;
2. alleged responsibility for the attacks on Uganda's diplomatic premises and personnel in Kinshasa and on its nationals; or
3. alleged violations of the Lusaka Agreement.²⁶

In respect of Uganda's first counter-claim, the Congo had argued that the counter-claim satisfied the requirement under Article 80 of a direct connection for the period from May to August 1998 only.²⁷ However, the Court held that as stated above,²⁸ as a general rule, the existence of a direct connection between the counter-claim and the principal claim should be assessed both in fact and in law. Contrary to the Congo's argument, the establishment of such a connection was not subject to the condition that "the counter-claimant's arguments should support the

²² Ibid para 35.

²³ [1997] ICJ Reports 257 para 31.

²⁴ [1998] ICJ Reports 203 para 33.

²⁵ Order of the Court para 36.

²⁶ Ibid para 37.

²⁷ Ibid para 38.

²⁸ See ibid para 36.

counter-claim and be pertinent for the purposes of rebutting the principal claim".²⁹

On the other hand, it was evident from the parties' submissions that their respective claims related to facts of the same nature, namely, the use of force and support allegedly provided to armed groups. While Uganda's counter-claim ranged over a longer period than that covered by the Congo's principal claim, both claims nonetheless concerned a conflict between these two neighbouring States since 1994, in various forms and of variable intensity, forming part of the same factual complex. Each party had sought to establish the other's responsibility based on the violation of:

1. the principle of the non-use of force incorporated in Article 2(4) of the United Nations Charter;
2. customary international law; and
3. the principle of non-intervention in matters within the domestic jurisdiction of States.

In this respect, the parties were pursuing the same legal aims.³⁰ Thus, the Court considered that Uganda's first counter-claim was directly connected with the subject-matter of the Congo's claims for the entire period covered.³¹

In respect of Uganda's second counter-claim, the Court found that it was evident from the case file that the facts Uganda relied upon occurred in August 1998, immediately after its alleged invasion of Congolese territory. On this point, each party had held the other responsible for various acts of oppression allegedly accompanying an illegal use of force.³² As a result, the Court found that since the facts were of the same nature, the parties' claims formed part of the same factual complex. This was because each had sought to establish the other's responsibility for the illegal use of force based on certain rules of conventional or customary international law on the protection of persons and property. As such, they pursued the same legal aims.³³

²⁹ Ibid para 37-38.

³⁰ Ibid para 38.

³¹ Ibid para 39.

³² Ibid para 40.

³³ Ibid.

Therefore, Uganda's second counter-claim was directly connected with the subject-matter of the Congo's claims.³⁴

In respect of Uganda's third counter-claim, the Court observed that Uganda's claim concerned quite specific facts. It had referred to the Congolese national dialogue, the deployment of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) and the disarmament and demobilisation of armed groups. These related to the *methods for solving the conflict* in the region agreed on a multilateral level in a ceasefire accord that received the 'strong support' of the United Nations Security Council in resolutions 1291 (2000) and 1304 (2000). As such, they concerned facts of a different nature from those the Congo relied upon in its claims.³⁵

On the other hand, the Congo's claims were related to acts for which Uganda was allegedly responsible *during that conflict* and the parties' claims did not form part of the same factual complex. Also, the Congo had sought to establish Uganda's responsibility on the violation of the applicable rules³⁶ while Uganda sought to establish the Congo's responsibility based on the violation of specific provisions of the Lusaka Agreement. Therefore, the Court held that the parties were not pursuing the same legal aims³⁷ and Uganda's third counter-claim was not directly connected with the subject-matter of the Congo's claims.³⁸

However, having found that Uganda's first and second counter-claims were directly connected with the subject-matter of the Congo's claims, the Court concluded that the sound administration of justice and the interests of procedural economy required the counter-claims and the principal claims to be considered together.³⁹ As a result, the Court held that Uganda's first and second counter-claims were admissible as such and formed part of the present proceedings but this did not apply to Uganda's third counter-claim.⁴⁰

³⁴ Ibid.

³⁵ Ibid para 42.

³⁶ Ibid para 38.

³⁷ Ibid para 42.

³⁸ Ibid para 43.

³⁹ Ibid para 44.

⁴⁰ Ibid para 45.

The Court stated that a decision on the admissibility of a counter-claim in the context of Article 80 did not prejudice any question that might come before it during the rest of the proceedings. Under its Rules and in the interests of the proper administration of justice,⁴¹ the Court held that it could rule on the parties' respective claims in a single set of proceedings. However, in doing so, it should not lose sight of the Applicant's interests to have its claims decided within a reasonable time-period.⁴²

During a meeting with the Court's President held on 11 June 2001,⁴³ the Agents of both parties indicated that they would file a further written pleading on the merits within the agreed time-limits.⁴⁴ As a result, the Court required the Congo to file a Reply and Uganda a Rejoinder, addressing their respective claims.⁴⁵ However, as was decided in earlier cases on this point,⁴⁶ to ensure strict equality between the parties, the Congo's right to present its views in writing a second time on Uganda's counter-claims in the form of an additional pleading was reserved. If this happened, it could be subject to a subsequent Order.⁴⁷

IV THE COURT'S FINDINGS

Having regard to Article 48 of the Court's Statute and Articles 31, 44-45 and 80 of its Rules, the Court made the following finding in its Order dated 29 November 2001:⁴⁸

⁴¹ Ibid para 46. Note that in order to protect the rights of third States entitled to appear before the Court derived from the Court's Statute, the Court would instruct the Registrar to transmit a copy of this Order to them: *ibid* para 47.

⁴² Ibid. Note that after concluding its Written Observations, the Congo had also submitted in a further alternative that it would be inappropriate (on the basis of expediency deriving from the requirements of the sound administration of justice) to join Uganda's claims to the proceedings on the merits under Article 80(3) of the Rules of Court: *ibid* para 16.

⁴³ Ibid para 5.

⁴⁴ Ibid para 49.

⁴⁵ Ibid para 50.

⁴⁶ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia*), Counter-Claims, Order of 17 December 1997 [1997] ICJ Reports 260, para 42; Oil Platforms (*Iran v United States*), Counter-Claim, Order of 10 March 1998 [1998] ICJ Reports 206, para 45; Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v Nigeria*), Order of 30 June 1999 [1999] ICJ Reports 986.

⁴⁷ See Order of the Court para 50.

⁴⁸ Ibid para 51.

A [The Court] Finds –

- (1) Uganda's first counter-claim was admissible and formed part of the current proceedings. (unanimously)
- (2) Uganda's second counter-claim was admissible and formed part of the current proceedings. (15:1 votes)⁴⁹
- (3) Uganda's third counter-claim was inadmissible and did not form part of the current proceedings. (unanimously)

(B) [The Court] Directs the Congo to submit a Reply and Uganda to submit a Rejoinder relating to the claims of both parties in the current proceedings and *fixes* the dates as time-limits for the filing of those pleadings.

(C) [The Court] Reserves the subsequent procedure for further decision.

⁴⁹ Per Guillaume P, Shi V-P, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby JJ, Kateka J *ad hoc*; Verhoeven J *ad hoc* (dissenting).

