

THE GREAT AFRICAN WAR AND THE INTERVENTION BY UGANDA AND RWANDA IN THE DEMOCRATIC REPUBLIC OF CONGO – 1998-2003

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I. Facts and context

In early August 1998, troops of Uganda and Rwanda entered the territory of the Democratic Republic of Congo (DRC).¹ These forces joined with troops from those two States that were already present in the DRC, adding significantly to the numbers of foreign troops in the country, and turning increasing tensions into a full-scale armed conflict. So began the Great African War (also known as the Second Congo War).² For the second time in as many years, the DRC was plunged into war: the conflict began barely a year after the end of the First Congo War (1996-1997).³ The Great African War is commonly said to have concluded in July 2003 with the institution of a transitional government and a notable reduction in the scale of hostilities.⁴ However, it is important to keep in mind that non-international armed conflict(s) involving numerous rebel groups have continued, and are still occurring in the DRC at the time of writing.⁵

The use of force by Uganda and Rwanda in August 1998 was in support of a number of rebel groups, comprised largely of Banyamulenge Tutsis,⁶ which opposed the new government of President Laurent Kabila.⁷ Fifteen months before, during the First Congo War, these same States – most notably Rwanda – had aided Kabila's rise to power and the overthrow of the previous president of Zaire (as the DRC was named from 1971 to 1997), Mobutu Sese Seko.⁸ Once he was in power, however, Kabila began to pursue a more independent policy, and began taking control of the State's machinery. This fact, coupled with the increase in actions from various militant rebel groups operating from within the DRC against neighbouring States,⁹ was seen by Uganda and Rwanda as a threat to their security and territorial integrity. The former allies of the DRC's newly installed president thus began aiding those in the DRC who sought to remove his fledgling government.

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¹ See Letter dated 14 September 1998 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the General Assembly (17 September 1998) UN Doc A/53/232, 2; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, (Application instituting proceedings) [1999] 5 <www.icj-cij.org/docket/files/116/7151.pdf> accessed 11 May 2016.

² For a useful synopsis of the factual background and development of Great African War, see Paul Harris, 'Congo's International Civil War' *Power and Interest News* (5 August 2003).

³ For a detailed examination of the First Congo War, see Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (Cambridge University Press 2009) in general, but particularly at 194-231; and Tom Cooper, *Great Lakes Holocaust: First Congo War, 1996-1997* (Helion 2013).

⁴ See, e.g., Council on Foreign Relations, 'Violence in the Democratic Republic of Congo' Global Conflict Tracker (last updated 6 June 2016) <www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/violence-in-the-democratic-republic-of-congo> accessed 6 June 2016.

⁵ Jeffrey Gettleman, 'The World's Worst War' *New York Times* (15 December 2012) <www.nytimes.com/2012/12/16/sunday-review/congos-never-ending-war.html?_r=0> accessed 6 June 2016.

⁶ Most prominently the Rassemblement Congolais pour la Démocratie (RCD) and the Mouvement de Libération du Congo (MLC).

⁷ See (August 1998) 44(8) *Keesing's* 42426; and Michela Wrong and Michael Holman, 'Army Mutiny Threatens Kabila's Rule in Congo' *Financial Times* (4 August 1998) 18.

⁸ Michael Holman and Michela Wrong, 'Ripples of a Revolution' *Financial Times* (26 May 1997) 21.

⁹ Wrong and Holman (n 7).

It should be noted that the DRC also alleged the use of force in its territory by Burundi.¹⁰ While Burundi repeatedly denied this¹¹ until 2001,¹² there is convincing evidence that Burundian troops did engage in the territory of the DRC.¹³ However, the force used by Burundi was of a notably lower scale than that of Uganda and Rwanda (fluctuating between 1,000 to 2,000 troops during the height of hostilities), and was confined to the Uvira-Baraka-Fizi area.¹⁴

Following the intervention by the States supporting the rebels (notably Uganda and Rwanda), other States (namely Angola, Zimbabwe, Namibia and Chad) initiated military action in support of the Kabila Government, adding to the scale of the conflict.¹⁵ Each of these pro-government States had differing reasons for entering the conflict, as did the States that supported the rebels.¹⁶ Broadly, however, it has often been asserted that the presence of so many State and non-State armed groups in the DRC at the turn of the 21st century was ultimately because of the allure of DRC's extensive mineral resources.¹⁷ This assertion is perhaps somewhat reductive (politics, ethnicity and security were all also crucial factors) but undoubtedly is true to an extent.

The Great African War was ultimately incredibly complex: factually, politically, socially and, of course, legally. It involved at least seven States and numerous non-State armed groups, variously embroiled in 'multiple international and non-international conflicts being fought concurrently on the Congo's vast territory'.¹⁸ Untangling the various aspects of the war thus remains a difficult task; the factual summary in this section is necessarily somewhat simplistic. What is certainly not in doubt, however, and what must always be borne in mind when considering the conflict, is its vast scale and staggering human cost, which were of a nature unprecedented in Africa. Sadly, it was dubbed the 'Great African War' with good reason.

A 2003 report issued by the International Rescue Committee concluded that the death toll in the DRC during the period 1998-2003 was the highest of any conflict since the Second World

¹⁰ (August 1998) 44(8) Keesing's, 42426.

¹¹ See, e.g., UNGA Verbatim Record (22 September 1998) UN Doc A/53/PV.9, 3 (Burundi).

¹² See Letter dated 11 May 2001 from the Permanent Representative of Burundi to the United Nations addressed to the President of the Security Council (11 May 2001) UN Doc S/2001/472, 12.

¹³ See Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford University Press 2009) 198.

¹⁴ *ibid.*

¹⁵ See Elizabeth Blunt, 'DR Congo War: Who is Involved and Why?' *BBC News* (25 January 2001) <<http://news.bbc.co.uk/1/hi/world/africa/1136470.stm>> accessed 6 June 2016. There were also unconfirmed reports of Sudanese forces being involved in the fighting in the DRC. See Christopher Williams, 'Explaining the Great War in Africa: How Conflict in the Congo Became a Continental Crisis' (2013) 37 *The Fletcher Forum of World Affairs* 81, 95-6; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) (2005) ICJ Rep 163 [130]. It seems highly likely that there was at least some Sudanese military involvement in the Great African War, although Sudan denied it. See (November 1998) 44(11) Keesing's, 42599; and Human Rights Watch, 'World Report: Sudan' (1999) <www.hrw.org/legacy/worldreport99/africa/sudan.html> accessed 6 June 2016.

¹⁶ See 'Democratic Republic of Congo Profile – Timeline' *BBC News* (14 August 2015) <http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1072684.stm> accessed 6 June 2016; and Reyntjens (n 3) 201-2.

¹⁷ See International Panel of Eminent Personalities (IPEP), 'Report on the 1994 Genocide in Rwanda and Surrounding Events' (2001) 40 *International Legal Materials* 141, 150; and Dena Montague, 'Stolen Goods: Coltan and Conflict in the Democratic Republic of Congo' (2002) 22 *School of Advanced International Studies Review* 103.

¹⁸ Louise Arimatsu, 'The Democratic Republic of the Congo 1993-2010' in Elizabeth Wilmshurst (ed.) *International Law and the Classification of Conflicts* (Oxford University Press 2012) 146, 176.

War.¹⁹ BBC News estimated that somewhere in the region of 2.5 million people had died as a result of the conflict by September 2001,²⁰ with this rising to around 3 million people by the end of substantial fighting in 2003.²¹ According to the World Health Organization, at its height, 73,000 people were dying monthly as a consequence of the conflict.²² While such estimates are indicative of the devastating nature of the war, again, the complex nature of the hostilities and the instability that this massive conflict created in the DRC has meant that it is impossible to know the exact scale of the human tragedy, even in retrospect. As a member of the United Nations (UN) Mission to the DRC (MONUC) stated, in relation to determining the human cost of the war: ‘Congo is so green you don’t even see the graves.’²³

II. The positions of the main protagonists and the reactions of third States and international organizations

1. The claims made by the DRC and the initiation of proceedings before the International Court of Justice (ICJ)

The DRC asserted almost immediately following the interventions of early August 1998 that it was the victim of an attack from outside its borders (as well as from within them), and initially singled out Rwanda as the principal State perpetrator.²⁴ By way of a letter dated 14 September 1998, the DRC formally notified the UN General Assembly of the intervention of foreign troops within its territory, and asked for the situation to be placed on the agenda of that organ’s 53rd session.²⁵

On 23 June 1999 the DRC filed three linked applications in the registry of the ICJ, initiating proceedings against Uganda, Rwanda and Burundi.²⁶ In these applications the DRC alleged, *inter alia*, that these three States had each committed an ‘armed aggression’ against the territory of the DRC ‘in flagrant violation of the United Nations Charter and the Charter of the Organisation of African Unity’.²⁷ The DRC sought compensation for what it asserted was the unlawful violation of its sovereignty and further unlawful acts committed within its territory.²⁸

The DRC also requested provisional measures from the ICJ to halt all Ugandan activity in its territory, particularly in relation to the fighting in Kisangani, although such measures were not

¹⁹ Report of the International Rescue Committee, *Mortality in the Democratic Republic of Congo: Results from a Nationwide Survey* (conducted September–November 2002, reported April 2003) 13 <www.rescue.org/sites/default/files/migrated/resources/drc_mortality_iii_report.pdf> accessed 6 June 2016.

²⁰ Sally Hardcastle, ‘Congo Pays the Price of War’ *BBC News* (26 September 2001) <<http://news.bbc.co.uk/1/hi/business/1564653.stm>> accessed 6 June 2016.

²¹ See ‘DR Congo Country Profile’ *BBC News* (10 February 2016) <http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1076399.stm#overview> accessed 6 June 2016. See also Montague (n 17).

²² Reported by Blaine Harden, ‘The Dirt in the New Machine’ *New York Times Magazine* (12 August 2001) 36.

²³ Reported in ‘A Report from Congo: Africa’s Great War’ *The Economist* (6 July 2002) <www.economist.com/node/1213296> accessed 10 May 2016.

²⁴ See Sam Kiley, ‘Congo Uprising Shatters Dream of Renaissance’ *The Times* (5 August 1998) 11.

²⁵ UN Doc A/53/232 (n 1).

²⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Application instituting proceedings) [23 June 1999] <www.icj-cij.org/docket/files/117/7071.pdf> accessed 6 June 2016; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Burundi)* (Application instituting proceedings) [23 June 1999] <www.icj-cij.org/docket/files/115/7127.pdf> accessed 6 June 2016; and *DRC v Uganda* (Application instituting proceedings) (n 1).

²⁷ See, e.g., *ibid*, 5.

²⁸ *ibid*, 19.

requested in relation to Rwanda (which was also involved in the fighting in and around that city).²⁹ The Court, having examined the DRC's provisional measures application and heard oral pleadings from both parties, issued an Order indicating provisional measures.³⁰ This, however, required *both parties* (rather than simply Uganda)³¹ to *i*) refrain from military action, *ii*) comply with their obligations under international law and *iii*) respect fundamental human rights in the 'zone of conflict'.³² The Order, of course, in no way amounted to a pronouncement on the legal responsibility of Uganda (or, indeed, of any other State).³³

Six months after the Court's provisional measures award, the DRC withdrew its applications alleging 'armed aggression' in respect of Rwanda and Burundi without offering any explanation as to why it was doing so.³⁴ However, it has been persuasively speculated that this was because of the fact that the basis of jurisdiction was much weaker in relation to the DRC's claims against these States (as opposed to its case against Uganda), and, thus, the DRC saw little point in continuing.³⁵

The DRC subsequently initiated a new application against Rwanda, which was filed in the Court's Registry on 28 May 2002.³⁶ The DRC requested that the Court adjudge and declare, *inter alia*, that Rwanda had acted in breach of Articles 2(3) and 2(4) of the UN Charter, requiring the peaceful resolution of disputes and the abstention from the threat or use of force, respectively.³⁷ The DRC simultaneously applied for provisional measures with respect to continuing Rwandan military action in its territory.³⁸ In contrast to the similar application made in relation to Uganda, however, the Court here rejected the DRC's request for provisional measures, predominantly on the grounds that it was unable to find even a *prima facie* basis for

²⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Demande en indication de mesures conservatoires République Démocratique du Congo contre la République de l'Ouganda) [19 June 2000] <www.icj-cij.org/docket/files/116/8311.pdf> accessed 7 June 2016.

³⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Order, request for indication of provisional measures) [2000] <www.icj-cij.org/docket/files/116/8058.pdf> accessed 13 June 2016.

³¹ See Dino Kritsiotis, 'Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda): Provisional Measures' (2001) 50 *International and Comparative Law Quarterly* 662, particularly 667-70. Thus, in effect, the Order did no more than reaffirm the decision of the Security Council in Resolution 1304. See n 90 – n 91 and accompanying text.

³² *DRC v Uganda* (Order, provisional measures) (n 30) particularly [47].

³³ This was exactly what was requested by the DRC: see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Oral pleadings) [26 June 2000] CR 2000/20 (DRC) <www.icj-cij.org/docket/files/116/4271.pdf> accessed 13 June 2016.

³⁴ The Court confirmed the discontinuance of these cases, at the DRC's behest, on 30 January 2001. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Burundi)* (Order) [30 January 2001] <www.icj-cij.org/docket/files/115/8054.pdf> accessed 13 June 2016; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Order) [30 January 2001] <www.icj-cij.org/docket/files/117/10576.pdf> accessed 13 June 2016.

³⁵ See, e.g., Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force since *Nicaragua*' (2003) 14 *European Journal of International Law* 867, 869. For the respective bases of jurisdiction advanced by the DRC, see, respectively, *DRC v Uganda* (Application instituting proceedings) (n 1) 10-1; *DRC v Rwanda* (Application instituting proceedings) (n 26) 9-13; and *DRC v Burundi* (Application instituting proceedings) (n 26) 9-11.

³⁶ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Requête introductive d'instance à la Cour Internationale de Justice de la Haye contre la République de Rwanda) [28 May 2002] <www.icj-cij.org/docket/files/126/7070.pdf> accessed 7 June 2016.

³⁷ *ibid*, 33.

³⁸ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Demande de mesures conservatoires) [28 May 2002] <www.icj-cij.org/docket/files/126/8277.pdf> accessed 13 June 2016.

jurisdiction in the case.³⁹ Unsurprisingly, given its conclusions on the provisional measures application, in 2006 the ICJ determined that it did not have the jurisdiction to hear the new application against Rwanda on the merits.⁴⁰ The case brought by the DRC against Uganda was thus ultimately the only dispute arising from the conflict to reach the merits phase of proceedings, with the Court issuing its judgment on 19 December 2005.

Thus, the DRC consistently alleged that it had suffered various acts of aggression. It is also worth noting, for completeness, that in response to a Ugandan counter-claim before the ICJ – that it was suffering attacks emanating from the DRC, which amounted to a breach of Article 2(4) of the UN Charter⁴¹ – the DRC additionally claimed that *i*) it was not responsible under international law for the attacks of any militant groups from its territory against Uganda,⁴² and *ii*), in the alternative, that the DRC was in any event itself entitled to respond in self-defence due to the Ugandan intervention.⁴³ Indeed, the DRC's self-defence counter-claim had been advanced from the very outset, well before the proceedings at the ICJ: on 2 September 1998, the DRC formally reported that it was undertaking military action in self-defence to the UN Security Council, as required by Article 51 of the UN Charter.⁴⁴

2. The claims made by pro-Kabila States involved in the conflict: Angola, Zimbabwe, Namibia and Chad

The States that intervened in the DRC in support of the Kabila government – Angola, Zimbabwe, Namibia and Chad⁴⁵ – justified their actions based on a mixture of intertwined legal claims, although predominantly they claimed to be acting in collective self-defence. In a letter to the President of the Security Council on 25 September 1998, Zimbabwe contended (on behalf of all of the pro-Kabila States) that ‘in line with Article 51 of the Charter of the United Nations regarding the right of a State to ask for military assistance when its security, sovereignty and territorial integrity are threatened.’⁴⁶ Zimbabwe also argued that the pro-Kabila coalition was acting under the authority of the Southern African Development Community (SADC), a fact that, Zimbabwe claimed, further legitimised the coalition's use of

³⁹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Order, request for indication of provisional measures) [10 July 2002] <www.icj-cij.org/docket/files/126/8158.pdf> accessed 13 June 2016, particularly [58-9]. For comment, see John R Crook, ‘The 2002 Judicial Activity of the International Court of Justice’ (2003) 97 *American Journal of International Law* 352, 356-58.

⁴⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Judgment, jurisdiction of the court and admissibility of the application) [23 February 2006] <www.icj-cij.org/docket/files/126/10435.pdf> accessed 13 June 2016, particularly [128].

⁴¹ See n 67 and accompanying text.

⁴² See, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Oral pleadings) [12 April 2005] CR 2005/3 (DRC) 25-9 <www.icj-cij.org/docket/files/116/4279.pdf> accessed 16 December 2016.

⁴³ See, e.g., *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Oral pleadings) [12 April 2005] CR 2005/11 (DRC) <www.icj-cij.org/docket/files/116/4271.pdf> accessed 13 June 2016, 24-30.

⁴⁴ Letter Dated 31 August 1998 from the Permanent Representative of the Democratic Republic of the Congo to the United Nations addressed to the President of the Security Council (2 September 1998) UN Doc S/1998/827. This self-defence report by the DRC was unusually detailed and extensive, running to 13 pages of text. For discussion, see James A Green, ‘The Article 51 Reporting Requirement for Self-Defense Actions’ (2015) 55 *Virginia Journal of International Law* 463, 604.

⁴⁵ It is worth noting that Sudan was also alleged to have intervened in support of Kabila, but it denied this and so, of course, offered no legal justification. See (n 10).

⁴⁶ Letter dated 23 September 1998 from the Permanent Representative of Zimbabwe to the United Nations addressed to the President of the Security Council (25 September 1998) UN Doc S/1998/891, 3.

force.⁴⁷ Namibia presented similar arguments in a plenary session of the General Assembly in March 1999.⁴⁸

The pro-Kabila States thus argued that they were acting multilaterally, under the banner of the SADC, and that they were intervening with the consent of the DRC's legitimate government. In addition, they claimed that even if their actions were a *prima facie* breach of Article 2(4) of the UN Charter they were justified as an exercise of the right of collective self-defence.

3. The claims made by anti-Kabila States involved in the conflict: Uganda and Rwanda (and Burundi)

None of the three States that participated in aiding the Congolese insurrection presented legal justifications for their use of force in the initial months following the deployment of troops within the territory of the DRC. Indeed, Burundi maintained, for a number of years, that it had no military involvement in the DRC whatsoever: in an address delivered before the UN General Assembly on 22 September 1998, for example, President Buyoya of Burundi asserted that his country was 'in no way involved in' the conflict in the DRC.⁴⁹ The next day, also before the General Assembly, the Rwandan representative similarly 'refute[d] in the most categorical terms Rwanda's military involvement in the [DRC].'⁵⁰ However, by November 1998, Rwanda had acknowledged that it was engaged in the fighting,⁵¹ whereas Burundi did not acknowledge its military presence in the DRC until May 2001.⁵² For its part, Uganda admitted the presence of its troops within the DRC earlier than did Rwanda or Burundi, but this was still not until 25 August 1998.⁵³

As irrefutable evidence emerged that Uganda and Rwanda did in fact have a major troop presence within the DRC's territory, these two States began to set out legal justifications for their actions. For example, in March 1999, the representative of Uganda told the Security Council that

the external dimension in the Congolese conflict, both in the case of Uganda [and] ... in the case of Rwanda, has been prompted by activities hostile to those countries emanating from the Congo. *Uganda and Rwanda acted in self-defence.*⁵⁴

Four days later, Uganda's Minister of Foreign Affairs, Amama Mbabazi (who was later to become Ugandan Prime Minister), made a speech before the General Assembly outlining the reasons for the presence of Ugandan troops within the DRC. He argued that the DRC had consented to the presence of Ugandan forces, at least initially,⁵⁵ and that Uganda also was acting to pre-empt a possible genocide from occurring in the DRC.⁵⁶ The primary argument advanced, however, was again Uganda's right of self-defence.⁵⁷ Here, the self-defence claim

⁴⁷ *ibid.* It is worth noting that the DRC has been a member of the SADC since 8 September 1997.

⁴⁸ UNGA Verbatim Record (23 March 1999) UN Doc A/53/PV.95, 20 (Namibia).

⁴⁹ UN Doc A/53/PV.9 (n 11) 3 (Burundi).

⁵⁰ UNGA Verbatim Record (23 September 1998) UN Doc A/53/PV.12, 44 (Rwanda). See also (August 1998) 44(8) Keesing's 42426.

⁵¹ See 'Rwanda Admits Having Troops in Congo' *BBC News* (6 November 1998) <<http://news.bbc.co.uk/1/hi/world/africa/209319.stm>> accessed 15 December 2016.

⁵² UN Doc S/2001/472 (n 12) 2.

⁵³ See Sam Kiley, 'Uganda Joins Rebels to Widen Congo War' *The Times* (26 August 1998) 9.

⁵⁴ UNSC Verbatim Record (19 March 1999) UN Doc S/PV.3987 (Resumption 1) 10 (Uganda) emphasis added.

⁵⁵ UN Doc A/53/PV.95 (n 48) 15 (Uganda).

⁵⁶ *ibid.*, 15-6 (Uganda).

⁵⁷ *ibid.*, particularly at 14 (Uganda).

was set out more thoroughly, with a focus on the threats and (in, some cases, actual attacks) to which Uganda claimed to be responding.⁵⁸ Mbabazi concluded that Uganda was threatened by ‘criminal gangs’ located within the territory of the DRC and, as such, that it had taken ‘appropriate measures to address this threat’.⁵⁹ Eventually, Uganda also formally reported its self-defence action to the Security Council, as required by Article 51 of the UN Charter (albeit not until June 2000).⁶⁰ Rwanda⁶¹ made similar claims to Uganda before UN organs, albeit that these were more generally focused on security and less explicitly tied to an invocation of self-defence. Unlike Uganda, Rwanda never formally reported its purported self-defence action to the Security Council.

Outside the forums of UN organs, representatives of Uganda and Rwanda consistently argued that their actions were defensive, while again not always referencing the legal right of self-defence *per se*. For example, Major General Saleh of Uganda was quoted as stating that Uganda had evidence of imminent attacks against it that were being arranged by President Kabila of the DRC, and that the presence of its troops in that territory was a justified response to this – essentially alluding to a ‘pre-emptive’ or ‘anticipatory’ self-defence claim.⁶² Similarly, on Rwandan state radio in January 1999, Rwanda’s then Vice-President referred to Rwanda’s involvement in the DRC as an exercise of the right of self-defence.⁶³

Before the ICJ, at the preliminary measures stage, Uganda contended that it was responding to a number of attacks that had been perpetrated against it by armed bands operating from within the territory of the DRC.⁶⁴ At the merits stage, Uganda expanded upon this claim. It argued that from when Kabila came to power (in May 1997) to 11 September 1998, it had the consent of the DRC to have troops stationed on Congolese territory,⁶⁵ and that, in any event, it was not responsible for many of the actions attributed to it by the DRC.⁶⁶ Further, Uganda argued, in counter-claim, that there had been a resumption of attacks by anti-Ugandan militant groups against the territory of Uganda, particularly the Allied Democratic Forces (ADF), emanating from the DRC.⁶⁷ Thus, Uganda formally argued before the ICJ that, following 11 September 1998, it had been acting in self-defence in intervening in the DRC and supporting rebel groups acting against the government.⁶⁸

⁵⁸ *ibid*, 13-5 (Uganda).

⁵⁹ *ibid*, 14 (Uganda).

⁶⁰ Letter dated 15 June 2000 from the Permanent Representative of Uganda to the United Nations addressed to the President of the Security Council (17 June 2000) UN Doc S/2000/596. This self-defence report particularly focused on Uganda’s self-defence claim in relation to various clashes in Kisangani.

⁶¹ See, e.g., UN Doc S/PV.3987 (Resumption 1) (n 54) 5 (Rwanda).

⁶² Reported in the Ugandan daily newspaper, *The New Vision* (26 August 1998) (cited in Phillip A Kasaija, ‘International Law and Uganda’s Involvement in the Democratic Republic of Congo (DROC)’ (2001-2002) 10 *Miami International and Comparative Law Review* 75, 76-7).

⁶³ Reported by the BBC World Service, ‘World: Africa Vice President of Rwanda Defiant in Face of EU Threat’ *BBC News* (15 January 1999) <<http://news.bbc.co.uk/1/hi/world/africa/255802.stm>> accessed 15 June 2016.

⁶⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Oral pleadings) [28 June 2000] CR 2000/23 (Uganda) <www.icj-cij.org/docket/files/116/4265.pdf> accessed 15 June 2016.

⁶⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Rejoinder submitted by Uganda) [6 December 2002] [89-105] <www.icj-cij.org/docket/files/116/8314.pdf> accessed 15 June 2016.

⁶⁶ *ibid* [106]-[60] and [551]-[95].

⁶⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Counter-memorial submitted by Uganda) [21 April 2001] [11]-[47] <www.icj-cij.org/docket/files/116/8320.pdf> accessed 15 December 2016. Such attacks had previously occurred prior to Kabila’s ascendancy to power, and Uganda argued, in a strategic shift, that the DRC’s government had again begun to support groups such as the ADF (as Zaire had done previously).

⁶⁸ See, e.g., *ibid* [52]-[4].

In the context of its self-defence claim, Uganda stressed that ‘the giving of logistical support to armed bands with knowledge of their objectives may constitute an armed attack’,⁶⁹ giving rise to the right of self-defence, and that concept of an armed attack extended to situations where there was, *inter alia*, ‘evidence of conspiracy between the State concerned and the armed bands...’.⁷⁰ Thus, while Uganda seemed to accept that there was a requirement for some degree of State involvement before the right of self-defence could be exercised in response to attacks by non-States actors, it took a wide view as to the necessary *level* of State involvement, extending this to mere logistical support and instances of ‘conspiracy’. In contrast, the DRC adopted a more traditional, restrictive view. It asserted that, for self-defence to be lawful against non-State actors, four (cumulative) conditions needed to be met.⁷¹ Notably, the last of these conditions was that the State from which the force by the non-State group emanated ‘*est impliqué de manière substantielle et active dans les activités de ces forces*’.⁷² The two States thus took contrasting views as to the required level of State involvement.⁷³

It is also worth noting that Uganda implied at the preliminary measures stage that prior to suffering any actual attacks, it had responded with force to the *threat* of attack by the non-State groups in question, which, it said, ‘constituted a major threat to Uganda’s security. Uganda could not sit still and wait to be attacked’.⁷⁴ Thus it again alluded to a form of ‘pre-emptive’ or ‘anticipatory’ self-defence as at least an element of its legal justification for the use of force.

However, somewhat in contrast to its position at the preliminary measures stage of the proceedings, at the merits stage Uganda appeared to retreat from implied indications that it was acting, even in part, in anticipatory/pre-emptive self-defence. Thus, its detailed articulation of the applicable law of self-defence in its counter-memorial made no explicit mention of a right to use force in self-defence against ‘attacks’ that had not yet occurred.⁷⁵ Uganda’s argument instead rested on self-defence in response to previous attacks: certainly this was how the ICJ ultimately interpreted Uganda’s arguments on the merits.⁷⁶ Having said this, Uganda did, at times during the merits proceedings, still refer to the ongoing ‘threat’ posed to its security by non-State armed groups emanating from the DRC.⁷⁷ It has thus been argued that, while never explicitly raised, anticipatory/pre-emptive self-defence ‘permeated the justifications’ put forward by Uganda.⁷⁸ In response to even such implicit suggestions of a justification based on anticipatory/pre-emptive self-defence, the DRC categorically asserted that ‘*l’article 51 de la Charte n’a pas été amendé, et la doctrine de l’action «préventive» ou «préemptive» ... n’a pas été admise en droit international. La légitime défense suppose toujours une «agression armée»...*’.⁷⁹

⁶⁹ *ibid* [350].

⁷⁰ *ibid* [359].

⁷¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Mémoire de la République Démocratique du Congo) [6 July 2000] [517] <www.icj-cij.org/docket/files/116/8321.pdf> accessed 15 December 2016.

⁷² *ibid*, emphasis added.

⁷³ For discussion, see Tom Ruys, ‘*Armed Attack*’ and Article 51 of the UN Charter (Cambridge University Press 2010) 479-83.

⁷⁴ See *DRC v Uganda*, CR 2000/23 (n 64).

⁷⁵ See *DRC v Uganda* (Counter-memorial submitted by Uganda) (n 67) [329]-[71].

⁷⁶ *DRC v Uganda* (Merits) (n 15) [144].

⁷⁷ See, e.g., *DRC v Uganda* (Counter-memorial submitted by Uganda) (n 67) [331].

⁷⁸ Phoebe N Okowa, ‘Case Concerning Armed Activities on the Territory of the Congo’ (2006) 55 International and Comparative Law Quarterly 742, 749.

⁷⁹ *DRC v Uganda*, CR 2005/3 (n 42) 42 [35].

In their submissions during the jurisdictional proceedings of their respective disputes, neither Rwanda nor Burundi provided any substantive justifications for their uses of force, preferring to restrict their arguments to jurisdictional questions.⁸⁰ However, Rwanda did set out its legal justification – again, self-defence – at the preliminary measures stage of *DRC v Rwanda (New Application)*, during the oral hearings. Rwanda was less explicit here in its invocation of self-defence than Uganda had been before the ICJ, but it still indicated that its military presence in the DRC was justified as an exercise of the right.⁸¹

Overall, Uganda and Rwanda consistently argued that their actions were justified under the right of self-defence (as well as, initially at least, because of the consent of the DRC). These arguments were not restricted to political forums of the UN, but were presented in the judicial setting of the ICJ, as well as more generally outside of the UN framework. For its part, Burundi continued to deny military involvement in the DRC until May 2001, when it finally asserted, in a letter to the Security Council, that it had ‘deploy[ed] a military self-defence operation covering the part of the territory of the Democratic Republic of the Congo along Lake Tanganyika’.⁸² However, Burundi was rather non-specific in this letter as to the extent of this avowedly defensive operation (in terms of both scale and timeframe), and, aside from this instance of claiming self-defence, it remained content not to advance legal justifications at all.

4. The positions adopted by international organisations and States not involved in the conflict

At the UN, the Security Council released a statement expressing concern over the growing tension in the region more than two weeks *before* to the large-scale intervention by the forces of the anti-Kabila States.⁸³ On 31 August 1998, the Council issued a further statement calling for a peaceful resolution to the conflict and the withdrawal of foreign troops (thereby explicitly acknowledging their presence in the territory).⁸⁴ Yet, the Council did not, at this stage, name any of the foreign parties involved or implement any measures to bring about their withdrawal.⁸⁵

The General Assembly responded to the growing crisis in January 1999, by passing a resolution (53/1 L) calling for aid to be given to the DRC, and reaffirming ‘the need for all States to refrain from interference in each other’s internal affairs.’⁸⁶ It then, a month later, passed a further resolution (53/160) focused on the need for increased peacekeeping efforts by and on behalf of African States and the necessity of the parties respecting basic human rights during hostilities.⁸⁷

⁸⁰ See, generally, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, (Memorial of the Republic of Rwanda) [21 April 2000] <www.icj-cij.org/docket/files/117/13465.pdf> accessed 15 June 2016; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Burundi)* (Memoire de la République du Burundi) [21 April 2000] <www.icj-cij.org/docket/files/115/13462.pdf> accessed 15 June 2016.

⁸¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Oral pleadings) [13 June 2002] CR 2002/37, [5] (Rwanda) <www.icj-cij.org/docket/files/126/4143.pdf> accessed 15 June 2016.

⁸² UN Doc S/2001/472 (n 12) 2.

⁸³ Statement by the President of the Security Council (13 July 1998) UN Doc S/PRST/1998/20.

⁸⁴ Statement by the President of the Security Council (31 August 1998) UN Doc S/PRST/1998/26.

⁸⁵ *ibid.*

⁸⁶ UNGA Res 53/1 L (11 January 1999) UN Doc A/RES/53/1 L, 6.

⁸⁷ UNGA Res 53/160 (9 February 1999) UN Doc A/RES/53/160. In addition, the General Assembly passed a number of other resolutions during its 53rd session that dealt more broadly with questions of peace and security in central Africa, clearly in response to the conflict, albeit not explicitly engaging with it directly. See UNGA

It was eight months after the start of the conflict, in April 1999, before the Security Council passed a resolution (1234) calling for an end to the fighting.⁸⁸ This resolution again explicitly acknowledged the presence of foreign troops within the DRC and further stressed the requirement that the DRC's territorial integrity be respected. Resolution 1234 essentially amounted to a codification of the Council's statement of the previous August, and still did not name the States that were parties to the conflict or express any judgment on the lawfulness of those States' actions, other than in the broadest of terms as applicable to all parties.

It has been stated that Resolution 1234 reflected a clear position on the part of the Security Council that 'aid to the Government was permissible; intervention or force to overthrow the Government was not.'⁸⁹ In other words, this has been seen as a veiled endorsement of, or at least acceptance of, the actions of the pro-Kabila States and a condemnation of the anti-Kabila States. This reading of the resolution perhaps goes a little far, but, in June 2000, the Security Council passed a further resolution (1304) that explicitly demanded the withdrawal of Ugandan and Rwandan troops from the DRC, while remaining silent on the interventions of Angola *et al.*⁹⁰ The Security Council's support for the legal claims made by the DRC is therefore clearly evident in Resolution 1304, at least: under Chapter VII, the Council required 'that *Uganda and Rwanda, which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo*, withdraw all their forces from the territory of the Democratic Republic of the Congo without further delay.'⁹¹ However, it is evident that as the conflict continued, the Council took a more neutral position, focused solely on the implementation of the ceasefire agreement.⁹²

It is also worth noting that the Security Council established the United Nations Organization Mission in the Democratic Republic of Congo (MONUC – since 2010 MONUSCO) by way of Resolution 1279 in November 1999.⁹³ MONUC's mandate was initially purely observatory, and related to the ceasefire agreement signed by the majority of the parties in Lusaka, Zambia on 10 July 1999.⁹⁴ However, MONUC's mandate was subsequently expanded and extended to a full-blown peacekeeping mission, first through Resolution 1291 in February 2000⁹⁵ and then through numerous further resolutions.⁹⁶

Outside of the UN context, the European Union (EU) was notably vocal with regard to the conflict, issuing a formal statement only days after the initial intervention in August 1998, which, *inter alia*, reiterated respect for humanitarian principles and human rights, as well as expressing concern over 'the possibility of foreign interference in the [DRC's] internal

Res 53/92 (16 December 1998) UN Doc A/RES/53/92; UNGA Res 53/78 A (8 January 1999) UN Doc A/RES/53/78 A; UNGA Res 53/94 (11 February 1999) UN Doc A/RES/53/94.

⁸⁸ UNSC Res 1234 (9 April 1999) UN Doc S/RES/1234.

⁸⁹ Christine Gray, *International Law and the Use of Force* (3rd ed., Oxford University Press 2008) 70.

⁹⁰ UNSC Res 1304 (16 June 2000) UN Doc S/RES/1304.

⁹¹ *ibid*, emphasis added.

⁹² Gray, *International Law and the Use of Force* (n 89) 70.

⁹³ UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279.

⁹⁴ *ibid*.

⁹⁵ UNSC Res 1291 (24 February 2000) UN Doc S/RES/1291.

⁹⁶ For a full list of these resolutions, see MONUC, United Nations Organization Mission in the Democratic Republic of the Congo, United Nations Documents on MONUC, Resolutions of the Security Council <www.un.org/en/peacekeeping/missions/past/monuc/resolutions.shtml> accessed 5 July 2016; and MONUSCO, United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, United Nations Documents on MONUSCO, Resolutions of the Security Council <www.un.org/en/peacekeeping/missions/monusco/resolutions.shtml> accessed 5 July 2016.

affairs'.⁹⁷ As such, the EU was tentatively supportive of the DRC from the outset. The EU went on to issue further similar statements in the subsequent weeks, urging, in particular, a peaceful resolution and requesting all parties to end hostilities and human rights violations.⁹⁸

The Organisation of African Unity (OAU) was, initially, more explicitly supportive of the DRC than the EU: on 17 August 1998 it '[r]eiterated its support for the Government of the Democratic Republic of the Congo and [...] condemned all external interventions in the internal affairs of that country under any pretext whatsoever.'⁹⁹ However, the OAU (and eventually its successor, the African Union) was ultimately a self-consciously neutral player in the subsequent attempts to secure and administer peace.¹⁰⁰ For example, when discussing the conflict in March 1999, Burkina Faso's representative at the Security Council (representing the OAU), explicitly refrained from taking a position in support of any particular party to the conflict: 'considering all of its members to be on an equal footing and, above all, concerned to preserve their unity and solidarity, the OAU is not in the habit of damning any of them.'¹⁰¹

For its part, SADC unsurprisingly went further still in its support for the DRC by endorsing and – at least purportedly – *authorising* the use of forces by the pro-Kabila States.¹⁰² However, this initial declaration of endorsement was not issued by the full SADC summit and so was of dubious procedural validity within the organisation.¹⁰³ The SADC in fact only formally endorsed military action by Angola *et al* retrospectively (and arguably, even then, still rather equivocally).¹⁰⁴ In any event, it quickly also moved towards adopting a more neutral stance, becoming the primary actor calling for a peace summit¹⁰⁵ and then taking perhaps the most prominent role in trying to broker a ceasefire.¹⁰⁶

In terms of individual States' positions, other States in Africa that were not party to the conflict were generally relatively neutral with regard to legal questions at the time, preferring to urge for peaceful resolution and respect for legal standards by all parties rather than attempting to apportion blame. Zambia, for example, called upon all of the States involved to end

⁹⁷ Statement on the situation in the Democratic Republic of the Congo issued in Brussels on 11 August 1998 by the Presidency of the European Union (13 August 1998) UN Doc S/1998/753.

⁹⁸ See Declaration by the Presidency of the European Union concerning the humanitarian situation in the Democratic Republic of the Congo (21 August 1998) UN Doc S/1998/788; and Statement on the situation in the Democratic Republic of the Congo issued on 28 August 1998 by the Presidency of the European Union (1 September 1998) UN Doc S/1998/824.

⁹⁹ Communiqué issued by the Central Organ of the Organization of African Unity Mechanism for Conflict Prevention, Management and Resolution, at the ambassadorial level (Addis Ababa, 18 August 1998) UN Doc S/1998/774.

¹⁰⁰ See Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge 2016) 224-5.

¹⁰¹ UN Doc A/53/PV.95 (n 48) 7 (Burkina Faso, representing the OAU).

¹⁰² The Summit of Heads of State or Governments of the Southern African Development Community (SADC), Grand Baie, the Republic of Mauritius, Communiqué (13-14 September 1998) 88 <www.sadc.int/files/3913/5292/8384/SADC_SUMMIT_COMMUNIQUE_1980-2006.pdf> accessed 29 November 2016. The Summit 'commended the Governments of Angola, Namibia and Zimbabwe for timorously providing troops to assist the Government and people of the DRC defeat the illegal attempt by rebels and their allies to capture the capital city, Kinshasa, and other strategic areas'. For the claim that this acted as legitimating authorisation, see n 47 – n 48 and accompanying text.

¹⁰³ Charles R Majinge, 'The Future of Peacekeeping in Africa and the Normative Role of the African Union' (2010) 2 Göttingen Journal of International Law 463, 482.

¹⁰⁴ Rodrigo Tavares, *Regional Security: The Capacity of International Organizations* (Routledge 2010) 63-4.

¹⁰⁵ UNSC 'Developments in 1998, Communications (August)' (1998) UNYB 84.

¹⁰⁶ See Emeric Rogier, *The Labyrinthine Path to Peace in the Democratic Republic of Congo* (Institute for Security Studies 2003) 4.

hostilities,¹⁰⁷ while Libya pressed particularly for peaceful resolution through engagement with the OAU.¹⁰⁸ South Africa was rather more supportive of the SADC's role in the conflict,¹⁰⁹ although it stopped short of endorsing the use of force by the pro-Kabila States. Instead, South Africa preferred to, in the abstract, 'condemn [...] all human rights violations in the Democratic Republic of the Congo and request [...] all belligerents to adhere to international agreements and conventions'.¹¹⁰

Outside of Africa, there was likewise some limited individual State support for the DRC, but this too was muted. For example, Malaysia highlighted the 'need to preserve the national sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo'.¹¹¹ Most States, however, again preferred to more generally condemn all violations of international law, without singling out any of the parties. Slovenia's position at the Security Council in March 1999 is a representative example: it 'strongly condemn[ed] all violations of human rights and international humanitarian law in the current conflict', but it did not apportion blame in this regard or discuss *ad bellum* questions.¹¹²

Overall, it may be said that the preponderance of international opinion was broadly, if tentatively, supportive of the DRC's claim to have been the victim of armed aggression, and, consequently, dismissive of the invocation of the right of self-defence by Uganda and Rwanda. However, once the scale of the conflict became more evident, and it became clear that no obvious end to it was in sight, most actors moved towards a firmly neutral stance, focused solely on conflict resolution.

III. Questions of legality

In March 1999, the Argentinean representative in the Security Council put it rather mildly when he said that '[t]his conflict [the Great African War] is legally complex'.¹¹³ The situation in the DRC created a plethora of legal concerns. For example, the war generated legal issues concerning, *inter alia*, the classification of armed conflict (involving various overlapping conflicts of different types in the region and the transition from different states of international and non-international armed conflict),¹¹⁴ large-scale violations of international humanitarian law¹¹⁵ and international human rights law,¹¹⁶ the deployment of peacekeeping forces and observers (in various guises)¹¹⁷ and the appropriation of the DRC's mineral wealth.¹¹⁸ These legal questions, and others – crucial as they are – go beyond the scope of this chapter. This section will restrict itself to *ad bellum* analysis, specifically in relation to the uses of force by the parties during the Great African War itself (1998-2003).

¹⁰⁷ UNGA Verbatim Record (24 March 1999) UN Doc A/53/PV.96, 9-10 (Zambia).

¹⁰⁸ *ibid.*, 4-6 (Libya).

¹⁰⁹ UN Doc A/53/PV.95 (n 48) 20 (South Africa).

¹¹⁰ *ibid.*, 21 (South Africa).

¹¹¹ *ibid.*, 19 (Malaysia).

¹¹² UN Doc A/53/PV.96 (n 107) 4 (Slovenia).

¹¹³ UNSC Verbatim Record (19 March 1999) UN Doc S/PV.3987, 8 (Argentina). See also Gray, *International Law and the Use of Force* (n 89) 68.

¹¹⁴ See, for in-depth analysis, Arimatsu (n 18) in general, but particularly at 167-85.

¹¹⁵ See, e.g., *DRC v Uganda* (Merits) (n 15) [181]-[221].

¹¹⁶ See, e.g., *D.R. Congo v Burundi, Rwanda and Uganda*, African Commission on Human and Peoples' Rights, Communication No. 227/99 (2003) <<http://hrlibrary.umn.edu/africa/comcases/227-99.html>> accessed 21 July 2016.

¹¹⁷ See, e.g., Denis M Tull, 'Peacekeeping in the Democratic Republic of Congo: Waging Peace and Fighting War' (2009) 16 *International Peacekeeping* 215.

¹¹⁸ See, e.g., *DRC v Uganda* (Merits) (n 15) [222]-[50].

1. The legality of the use of force by the anti-Kabila States

The ICJ found – in its 2005 *DRC v Uganda* merits decision – that Uganda was responsible for most of the uses of force attributed to it by the DRC.¹¹⁹ It is undeniable that Rwanda was also responsible for the use of military force, irrespective of the fact that the ICJ was jurisdictionally unable to reach such a finding.¹²⁰ Both States acted in *prima facie* breach of the prohibition in Article 2(4) of the UN Charter (as did, it seems, Burundi: albeit on a significantly lower scale). The question is, therefore, whether there was any legal justification for these States' recourse to force.

As a preliminary matter, it will be recalled that it was claimed, at least by Uganda, that the DRC had consented to the presence of troops within its territory in the context of the First Congo War, and that this justified the use of force (certainly until September 1998).¹²¹ Consent by the legitimate government of a State to the use of force, or presence of troops, on its territory means that the force concerned does not contravene the prohibition in Article 2(4).¹²² This is because, if the consent is valid, 'the use of force does not infringe the "territorial integrity or political independence of any state" [as per Article 2(4)], but is instead a manifestation of [the consenting] state's agency and political independence.'¹²³

However, it would seem that the Kabila government withdrew any consent to the presence of Ugandan, Rwandan and Burundian forces in July 1998.¹²⁴ If so, any continuing presence of these forces – and the intervention of further forces from early-August 1998 – could not have been legally justified on this basis. The withdrawal of consent in July was admittedly somewhat equivocal,¹²⁵ but what *is* clear is that Kabila unambiguously withdrew any consent on the part of the DRC at the Victoria Summit on 8 August 1998.¹²⁶ The ICJ therefore held that any DRC consent to the presence of Ugandan forces on its territory was unquestionably terminated by 8 August 1998.¹²⁷ It also noted that consent may have been withdrawn even before this date, although the Court felt that it was not necessary to decide conclusively on this point.¹²⁸ While the ICJ was not able to pronounce on this question in relation to the actions of Rwanda and Burundi, there is no reason to conclude that the effect of the withdrawal of consent was any different in relation to these States, again at least from 8 August 1998 onwards (if not before).

As discussed in the previous section, the primary justification advanced by Uganda and Rwanda for their uses of force against the DRC was the right of self-defence. Prior to the ICJ's *DRC v Uganda* merits decision in 2005, academic legal appraisal of the *ad bellum* aspects of

¹¹⁹ Although the Court held, for example, that it had not been established that Uganda participated in the attack on Kitona on 4 August 1998. *ibid* [62]-[71].

¹²⁰ See, e.g., Andrew Mollel, 'International Adjudication and Resolution of Armed Conflicts in the African Great Lakes: A Focus on the DRC Conflict' (2009) 1 *Journal of Law and Conflict Resolution* 10, particularly at 22.

¹²¹ See n 55 and accompanying text; and n 65 and accompanying text.

¹²² See Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 *British Yearbook of International Law* 189; and Max Byrne, 'Consent and the Use of Force: an Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 *Journal on the Use of Force and International Law* 97.

¹²³ *ibid*, 99.

¹²⁴ *DRC v Uganda* (Merits) (n 15) [49].

¹²⁵ See, e.g., *ibid* [106].

¹²⁶ See *ibid* [49]-[51]; and Arimatsu (n 18) 174.

¹²⁷ *DRC v Uganda* (Merits) (n 15) [42]-[54].

¹²⁸ *ibid*.

the conflict in the DRC was relatively rare, but – within the literature that did emerge – the majority view was that this self-defence claim could not be supported in law. This was, predominately, for two reasons: because the Ugandan/Rwandan use of force was in response to attacks by non-State actors that were not meaningfully supported or controlled by the DRC,¹²⁹ and/or because the actions of these two States were disproportionate in relation to the attacks of the non-State groups in question.¹³⁰

In its appraisal of Uganda's self-defence claim, the ICJ noted that Uganda had not indicated that it was responding to direct attacks by the forces of the DRC, but, rather, from attacks emanating from the DRC's territory, most notably from the ADF.¹³¹ The Court accepted that a number of attacks by non-State actors had occurred,¹³² but held that no satisfactory proof had been advanced to indicate that the DRC had any involvement in the attacks perpetrated by the ADF (and others) against Uganda prior to Uganda's use of force.¹³³ On this basis, the ICJ held that Uganda had not suffered an armed attack¹³⁴ by the DRC and so could not have been exercising its right of self-defence *against* the DRC.¹³⁵ The ICJ therefore concluded that Uganda was in breach of Article 2(4) of the UN Charter.¹³⁶

The ICJ thus seemingly shared the view of those scholars who had previously concluded that the Ugandan (and Rwandan) use of force was unlawful because the exercise of self-defence in response to attacks by non-State actors is precluded in situations where the 'host' State is not legally responsible for those attacks.¹³⁷ This position also echoed the Court's pronouncements in previous decisions.¹³⁸ More generally, it accorded with the traditional understanding of self-defence as a purely inter-State phenomenon.¹³⁹

However, it should be noted that, in the *DRC v Uganda* case, the Court did not go so far as to completely rule out the possibility of self-defence in response to 'large-scale attacks by irregular forces',¹⁴⁰ an issue on which it declined to respond.¹⁴¹ As such, the ICJ's position in

¹²⁹ See, e.g., Constantine Antonopoulos, 'The Unilateral Use of Force by States after the End of the Cold War' (1999) 4 *Journal of Armed Conflict Law* 117, 138. However, for a contrary view, see Phillip Apuuli Kasaija, 'International Law and Uganda's Involvement in the Democratic Republic of the Congo (DROC)' (2001-2002) 10 *University of Miami International and Comparative Law Review* 75, 82-4.

¹³⁰ See, e.g., Antonopoulos (n 129) 138-9; and André Mbata B Mangu, 'The Conflict in the Democratic Republic of Congo and the Protection of Rights under the African Charter' (2003) 3 *African Human Rights Law Journal* 235, 241.

¹³¹ *DRC v Uganda* (Merits) (n 15) [146].

¹³² *ibid* [132].

¹³³ *ibid* [133]-[47].

¹³⁴ The occurrence of an 'armed attack' being a key legal trigger for self-defence, as per UN Charter 1945, Article 51. See, generally, Ruys (n 73).

¹³⁵ *DRC v Uganda* (Merits) (n 15) [147].

¹³⁶ *ibid* [148]-[65].

¹³⁷ See n 129 and accompanying text.

¹³⁸ *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*), (Merits) (1986) ICJ Rep 14 [115] and [195]; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 135 [139]. For commentary, see James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 44-51.

¹³⁹ See, e.g., Hans Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations' (1948) 42 *American Journal of International Law* 783, 791.

¹⁴⁰ *DRC v Uganda* (Merits) (n 15) [147].

¹⁴¹ *ibid*.

DRC v Uganda on this question – much like in previous decisions – is not entirely clear,¹⁴² but the Court certainly strongly indicated that a relatively high level of State involvement in an armed attack is required.¹⁴³

The question of whether (and, if so, the circumstances under which) a State can respond in self-defence against attacks perpetrated by non-State actors has been described in commentary as being a ‘central issue’ that was ‘at the core’ of the *DRC v Uganda* case.¹⁴⁴ Academic appraisal of this aspect of the ICJ’s decision was deeply divided. Some commentators supported the Court’s seeming endorsement of a requirement of substantial State involvement in any attack giving rise to self-defence.¹⁴⁵ Others took a diametrically opposed view, arguing that the ICJ’s approach to the question of self-defence in response to the actions of non-State actors was overly narrow, and failed to take into account the modern reality of security threats posed to States by non-State actors.¹⁴⁶ Moreover, and along similar lines, three judges of the Court itself were critical of the majority’s position on this issue in their individual opinions appended to the decision.¹⁴⁷

While, of course, decisions of the ICJ can only ever represent a ‘freeze-frame’ of the law (or, at least, the *Court’s view* of the law) at the time at which the facts that are the subject the dispute in question occurred,¹⁴⁸ it is worth noting that there has been significant and increasing debate since 9/11 over whether a State that has suffered an attack perpetrated by a non-State actor can use force in response. This is not the place to engage with that debate, but it can at least be said there have been an increased number of attempts by States, in the 21st century, to justify their uses of force as actions of self-defence against non-State actors.¹⁴⁹ These instances from practice have been interpreted by some commentators as indicating either *i)* the beginnings of a paradigm shift in the customary international law towards contemporary customary international law allowing for self-defence actions against actors that have little or no

¹⁴² For discussion, see Green, *The ICJ and Self-Defence* (n 138) 44-51; and Brent Michael, ‘Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defense’ (2009) 16 Australian International Law Journal 133, 142-4.

¹⁴³ See Green, *The ICJ and Self-Defence* (n 138) 46; and Constantine Antonopoulos, ‘Force by Armed Groups as Armed Attack and the Broadening of Self-Defence’ (2008) 55 Netherlands International Law Review 159, 165.

¹⁴⁴ Stephanie A Barbour and Zoe A Salzman, ‘The Tangled Web: The Right of Self-Defense against Non-State Actors in the Armed Activities Case’ (2007-2008) 40 New York University Journal of International Law and Politics 53, 54.

¹⁴⁵ See, e.g., Alexander Orakhelashvili, ‘Legal Stability and Claims of Change: The International Court’s Treatment of *Jus ad Bellum* and *Jus in Bello*’ (2006) 75 Nordic Journal of International Law 371, 394-6; and Sten Verhoeven, ‘A Missed Opportunity to Clarify the Modern *Ius ad Bellum*: Case Concerning Armed Activities on the Territory of the Congo’ (2006) 45 Military Law and Law of War Review 355, 358-60.

¹⁴⁶ See, e.g., Barbour and Salzman (n 144); Okowa (n 78) 747-9; and Natalino Ronzitti, ‘The Expanding Law of Self-Defence’ (2006) 11 Journal of Conflict and Security Law 343, 348-50.

¹⁴⁷ See *DRC v Uganda* (Merits) (n 15) separate opinion of Judge Simma [4]-[15]; declaration of Judge Koroma [9]; and separate opinion of Judge Kooijmans [19]-[30].

¹⁴⁸ For discussion, in relation to the ICJ and possible changes to the law on the use of force, see Green, *The ICJ and Self-Defence* (138) 24-5.

¹⁴⁹ See, e.g., some of the relevant chapters in this volume engaging with instances from State practice where such a claim has been made: Michael Byers’ chapter ‘The Intervention in Afghanistan – 2001’; Monica Pinto’s chapter ‘Operation Phoenix, Colombian raid against the FARC in Ecuador – 2008’; and Olivier Corten’s chapter ‘The Military Operation against the ‘Islamic State’ (Daesh) – 2014’ EDITORS TO ADD CROSS REFERENCES.

relationship to, or with, their ‘host’ State,¹⁵⁰ or, *ii*) for some, that such a shift has already occurred.¹⁵¹ It is fair to say, however, that such claims remain highly contested.¹⁵²

Another noteworthy *ad bellum* element of the ICJ’s decision in *DRC v Uganda* was that the Court implicitly suggested that a number of smaller scale attacks could cumulatively reach the necessary gravity to constitute an armed attack.¹⁵³ Based on this tentative endorsement of the so-called ‘accumulation of events’ theory,¹⁵⁴ if one were to reject the Court’s finding that Uganda could not have been acting in self-defence because the DRC was not responsible for the border attacks against it (on the basis that State responsibility for any given armed attack is not legally required for self-defence), one might perhaps conclude that the use of force by Uganda – and, by extension, Rwanda – may have been lawful actions. This would be incorrect, however. While the Court felt it extraneous in *DRC v Uganda* to engage in detail with the crucial customary international law requirements of necessity and proportionality,¹⁵⁵ which undoubtedly apply to all self-defence actions,¹⁵⁶ it did briefly indicate that the use of force did not comply with these requirements:

The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda’s border would 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.¹⁵⁷

¹⁵⁰ See Olivia Flasch, ‘The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors’ (2016) 3 *Journal on the Use of Force and International Law* 37, 52-64; and Michael Byers, ‘Terrorism, the Use of Force and International Law after 11 September’ (2002) 51 *International and Comparative Law Quarterly* 401, 407-9.

¹⁵¹ See, e.g., Thomas M Franck, ‘Terrorism and the Right of Self-Defence’ (2001) 95 *American Journal of International Law* 839, 840; Sean D Murphy, ‘Self-Defence and the *Israeli Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?’ (2005) 99 *American Journal of International Law* 62, 67-70; Kimberley N Trapp, ‘Back to Basics: Necessity, Proportionality and the Right of Self-Defence Against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141, particularly 147-55; Kimberley N Trapp, ‘Actor-Pluralism, the “Turn to Responsibility” and the *Jus ad Bellum*: “Unwilling or Unable” in Context’ (2015) 2 *Journal on the Use of Force and International Law* 199; Ruth Wedgwood, ‘Responding to Terrorism: Strikes Against bin Laden’ (1999) 24 *Yale Journal of International Law* 559, particularly at 564; and Ruth Wedgwood, ‘The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defence’ (2005) 99 *American Journal of International Law* 52, 57-9.

¹⁵² See, e.g., Ruys (n 73) 368-510; Iain Scobbie, ‘Words My Mother Never Taught Me: In Defence of the International Court’ (2005) 99 *American Journal of International Law* 76, 80-1; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press 2005) 84-191; and Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 443-70.

¹⁵³ *DRC v Uganda* (Merits) (n 15) [146] (‘on the evidence ... even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC’). See also *Nicaragua*, (Merits) (n 138) [231]; and *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161 [64].

¹⁵⁴ See, generally, Norman M Feder, ‘Reading the UN Charter Connotatively: Towards a New Definition of Armed Attack’ (1987) 19 *New York University Journal of International Law and Politics* 395, 415-18; Derek W Bowett, ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 *American Journal of International Law* 1, 5; and Gray, *International Law and the Use of Force* (n 89) 155-56.

¹⁵⁵ *DRC v Uganda* (Merits) (n 15) [147].

¹⁵⁶ See, e.g., Stanimir A Alexandrov, *Self-Defence Against the Use of Force in International Law* (Kluwer Law International 1996) 20; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) particularly at 6 and 11; and Oscar Schachter, ‘Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity: Remarks’ (1992) 86 *American Society of International Law Proceedings* 39.

¹⁵⁷ *DRC v Uganda* (Merits) (n 15) [147].

This finding by the Court must be correct on the facts: the actions of Uganda and Rwanda, even if *prima facie* taken in response to an armed attack (by non-State actors, perhaps cumulatively), were probably unnecessary and almost certainly disproportional. As such, even leaving aside the contestable issue of whether Uganda and Rwanda could have lawfully responded to attacks by the ADF (and other groups) for which the DRC was not found to be responsible, there is little question that the ICJ's ultimate finding that the use of force was not a lawful action in self-defence is accurate. However, the key reason for this resides in the application of the (much-overlooked, but crucial) customary criteria of necessity and proportionality.¹⁵⁸ It may well also be correct to hold that the anti-Kabila States were not acting in self-defence because the DRC was not responsible for any prior uses of force against them, but – reversing the logic of the ICJ¹⁵⁹ – it would seem unnecessary to reach a definite conclusion on this controversial point, because these actions were not necessary or proportional in any event.

In relation to the question of anticipatory/pre-emptive self-defence, it should be noted that the ICJ declined to pronounce on the question in the *DRC v Uganda* merits decision.¹⁶⁰ This has been criticised by some on the basis that such arguments were at least implicit in the claims presented by Uganda.¹⁶¹ However, ultimately, the issue of anticipatory self-defence was not formally raised by Uganda, meaning that it would not have been appropriate for the ICJ to have considered the lawfulness of anticipatory action.¹⁶² Given that pre-emptive action was not central to the claims of the States engaged in the Great African War, it is enough for our purposes to note here that arguments of anticipatory self-defence remain highly controversial.¹⁶³ Even if one were to accept the permissibility of the use of force in self-defence prior to the occurrence of an armed attack,¹⁶⁴ however, it is still questionable whether the actions of Uganda and Rwanda could be considered proportionate even in a preventative context.

Finally, it is worth recalling that Article 51 also provides that: '[m]easures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council...'¹⁶⁵ In the initial months following the intervention, neither Uganda nor Rwanda reported their avowed self-defence actions formally to the Security Council.¹⁶⁶ Admittedly, as noted, Uganda ultimately reported its self-defence actions, but not until June 2000.¹⁶⁷ Burundi also reported, but not until May 2001,¹⁶⁸ and Rwanda never reported. Admittedly, it is

¹⁵⁸ This view was shared by a number of scholars. See, e.g., Antonopoulos, *The Unilateral Use of Force* (n 129) 138-9; Mangu (n 130) 241; Faustin Ntoubandi, 'The Congo/Uganda Case: A Comment on the Main Legal Issues' (2007) 7 *African Human Rights Law Journal* 162, 172-3; and Orakhelashvili (n 145) 396-9 (implicitly reaching this conclusion).

¹⁵⁹ *DRC v Uganda* (Merits) (n 15) [147].

¹⁶⁰ *ibid* [143].

¹⁶¹ Okowa (n 78) 749.

¹⁶² Under the *non ultra petita* rule, the ICJ cannot examine aspects of a dispute not raised by the parties. See *Asylum case (Colombia/Peru)* (Merits) [1950] ICJ Rep 266, 402; *Case Concerning Certain German Interests in Polish Silesia* (Merits) [1926] PCIJ Rep, Series A 7, 35; and *Nicaragua* (Merits) (n 138) [207].

¹⁶³ See, generally, James A Green, 'The *Ratione Temporis* Elements of Self-Defence' (2015) 2 *Journal on the Use of Force and International Law* 97, 102-8; and Ruys (n 73) 250-367.

¹⁶⁴ For example, see James Thuo Gathii, 'Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)' (2007) 101 *American Journal of International Law* 142, 143, 148 (indicating that the use of force by Uganda could not have been lawful as the occurrence of an armed attack is a pre-condition for the exercise of the right of self-defence).

¹⁶⁵ UN Charter 1945, Article 51.

¹⁶⁶ *ibid* [145] (noting this, specifically in relation to Uganda, and clearly drawing a negative inference from it, although not expanding upon what that inference was).

¹⁶⁷ UN Doc S/2000/596 (n 60).

¹⁶⁸ UN Doc S/2001/472 (n 12).

generally accepted that a failure to provide such a report does not necessarily make an otherwise lawful use of force in self-defence unlawful.¹⁶⁹ However, the failure to report,¹⁷⁰ or to report in a timely manner,¹⁷¹ can act as an indication of the unlawfulness of military action, or at least as evidence that the State concerned did not believe it was acting in self-defence. It is notable that in the *DRC v Uganda* merits decision, the Court ‘observe[d] that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.’¹⁷² The Court therefore seemingly drew a negative inference from Uganda’s failure to report in a timely manner, although admittedly it did not expand further upon what exactly that inference was.¹⁷³ What may thus be said is that the failure to report (in the case of Rwanda), or to report in a timely manner (in the case of Uganda and Burundi) further undermines the self-defence claims of these States.

2. The legality of the use of force by the DRC

Given that it found that Uganda was not acting in self-defence, it is unsurprising that the ICJ also dismissed Uganda’s counter-claim that the DRC had itself violated Article 2(4) by supporting the ADF and other groups. The Court reiterated that it had not been established that the DRC (or Zaire before it) had supported anti-Ugandan groups acting from within its territory.¹⁷⁴ Indeed, the Court found that following the fall of Mobutu, the DRC had attempted to act *against* such rebels, albeit that it had struggled in this regard because of the nature of the terrain of its eastern border.¹⁷⁵ As such, the DRC was not in breach of Article 2(4).

Further, the ICJ held that any *prima facie* breach by the DRC of Article 2(4) following 2 August 1998 could be justified as an action of self-defence taken in response to Uganda’s own violation of that article’s use of force prohibition,¹⁷⁶ although the Court again stressed that no such *prima facie* breach of Article 2(4) by the DRC had been established in any event.¹⁷⁷ While various other questions about the legality of the DRC’s actions in the context of the Great African War exist, purely in the context of *ad bellum* issues, it is fairly clear that the DRC acted lawfully.¹⁷⁸ It was not responsible for the attacks by non-State groups emanating from its territory, and any uses of force that it may have been responsible for were nonetheless justified as self-defence.

3. The legality of the use of force by the pro-Kabila States

Despite the fact that the Security Council, in August 1998, called for ‘the withdrawal of *all* foreign forces’,¹⁷⁹ it is relatively clear that this was focused on restoring peace in the region and was without prejudice to the lawfulness of the actions of the pro-Kabila States. These

¹⁶⁹ Green, The Article 51 Reporting Requirement (n 44) 592-6.

¹⁷⁰ See *Nicaragua* (Merits) (n 138) [200]. However, the ICJ reached this conclusion on the basis of customary international law and not Article 51 itself: the legal implications of the reporting requirement remain somewhat unclear. See also DW Greig, ‘Self-Defence and the Security Council: What Does Article 51 Require?’ (1991) 40 *International and Comparative Law Quarterly* 366, particularly 367-88; and Green, The Article 51 Reporting Requirement (n 44) particularly at 592-6.

¹⁷¹ *ibid*, 596-9.

¹⁷² *DRC v Uganda* (Merits) (n 15) [145].

¹⁷³ See Green, The Article 51 Reporting Requirement (n 44) 612.

¹⁷⁴ *DRC v Uganda* (Merits) (n 15) [297]-[301].

¹⁷⁵ *ibid* [303].

¹⁷⁶ *ibid* [304].

¹⁷⁷ *ibid*.

¹⁷⁸ Although a small number of commentators have taken a contrary view. See, e.g., Okowa (n 78) particularly at 747-9.

¹⁷⁹ UN Doc S/PRST/1998/26 (n 84) emphasis added.

States were, after all, unequivocally invited to intervene by the Kabila government,¹⁸⁰ which was the recognized authority in the DRC (evidenced, for example, by its incumbency of the DRC's seat at the UN). As noted above, the genuine consent on the part of the State in which force is being used means that the prohibition of the use of force is circumvented.¹⁸¹

Alternatively, it also is relatively uncontroversial to conclude¹⁸² that Angola *et al* complied with the basic requirements for collective self-defence: i.e., response to an armed attack, at the request of the victim State, in a necessary and proportional manner.¹⁸³ Their uses of force, as individual States acting together in the collective self-defence of the DRC, were almost certainly lawful (at least in an *ad bellum* sense), even if one were to conclude that Article 2(4) was triggered *prima facie* by their actions.¹⁸⁴ Indeed, the fact that the Security Council explicitly emphasised – in the context of the conflict – the individual *and* collective right of self-defence in resolution 1234 (1999)¹⁸⁵ acts as an implicit affirmation of this legal conclusion.¹⁸⁶

What is perhaps more controversial is the parallel assertion advanced by these States as to the legitimacy provided by the SADC endorsement of their actions.¹⁸⁷ A regional organisation can, of course, exercise the right of collective self-defence without Security Council authorisation where the legal requirements for the exercise of that right are met.¹⁸⁸ However, one possible reading of the way in which the legal justifications were advanced might suggest that Zimbabwe presented SADC authorisation as an *alternative* legal basis for its intervention (and implied that this was also the position of Angola and Zambia as well), with collective self-defence invoked as a separate claim.¹⁸⁹ If this reading is correct, such a position would seem dubious. The SADC endorsement of the military action was questionable procedurally,¹⁹⁰ indeed, there was not an established SADC mechanism for the 'authorisation' of force.¹⁹¹ More generally, a regional organisation cannot, in and of itself, authorise an otherwise unlawful use of force (beyond peacekeeping measures).¹⁹² Nonetheless, the somewhat dubious nature of the claim that SADC authorised the use of force is essentially moot, given that the actions of these States were almost certainly lawful, either due to the 'intervention by invitation' doctrine or as an exercise of the right of collective self-defence.

To summarise, and significantly over-simplify – purely in relation to *ad bellum* questions – it seems correct to hold that the use of force by Uganda and Rwanda in the context of the Great

¹⁸⁰ See Report on the situation of human rights in the Democratic Republic of the Congo, submitted by the Special Rapporteur pursuant to Economic and Social Council decision 1998/260 of 30 July 1998 (10 September 1998) UN Doc A/53/365 [26].

¹⁸¹ See n 122 – n 123 and accompanying text.

¹⁸² Nina Wilén, *Justifying Interventions in Africa: (De)Stabilizing Sovereignty in Liberia, Burundi and the Congo* (Palgrave Macmillan 2012) 102.

¹⁸³ For discussion of the criteria for collective self-defence, see Gray, *International Law and the Use of Force* (n 89) 167-92.

¹⁸⁴ Martin R Rupiya, 'A Political and Military Review of Zimbabwe's Involvement in the Second Congo War' in John F Clark (ed), *The African Stakes of the Congo War* (Palgrave Macmillan 2002) 93, 96-7.

¹⁸⁵ UN Doc S/RES/1234 (n 88).

¹⁸⁶ Wilén (n 182) 106.

¹⁸⁷ *ibid*, 106-7. See also Reyntjens (n 3) 198.

¹⁸⁸ Nigel D White, *The Law of International Organisations* (2nd ed., Manchester University Press 2005) 203-23.

¹⁸⁹ See n 47 – n 48 and accompanying text.

¹⁹⁰ See n 103 and accompanying text.

¹⁹¹ Tavares (n 104) 64.

¹⁹² White (n 188) 203-23, particularly at 215.

African War was unlawful.¹⁹³ Whereas, the use of force by Angola, Zimbabwe, Namibia, Chad and the DRC itself was lawful.¹⁹⁴

IV. Conclusion: precedential value

The intricate and sensitive nature of the situation in the DRC, not to mention its vast scale, meant that the responses of the international community offer a useful illustration of the complexities of navigating the relationship between modern conflict and international law in numerous respects. From the *ad bellum* perspective, however, the primary legacy of the conflict is to be found in the resulting proceedings before the ICJ, and particularly the Court's merits decision in *DRC v Uganda*. It is worth noting that this case was exceptional in the context of the law governing self-defence in that it was the first – and remains the only – contentious case where the ICJ possessed an uncontroversial or 'full' jurisdictional basis to examine self-defence issues. Both the DRC¹⁹⁵ and Uganda¹⁹⁶ explicitly invoked the law of self-defence, and both had made declarations under Article 36(2) of the Court's Statute (with neither declaration containing anything that precluded the Court from examining the law on the use of force).¹⁹⁷ One might therefore somewhat lament the fact that the Court was relatively cautious in its appraisal of use of force questions,¹⁹⁸ and that it did not take the opportunity to clarify a number of issues that had previously plagued its *ad bellum* jurisprudence,¹⁹⁹ given that it truly had a secure jurisdictional basis from which to do so for the first time.

In any event, perhaps the most pertinent finding²⁰⁰ in the *DRC v Uganda* merits decision – which has continued to resonate in debates over the *jus ad bellum* since – was the Court's (admittedly tentative) endorsement of a requirement that attacks by non-State actors must be attributable in some meaningful way to the State against which the victim State uses force in response. However, as discussed in the previous section, this finding certainly did not resolve the debate on this issue. The *DRC v Uganda* case, in fact, added further fuel to the growing fire of controversy on the question of self-defence against non-State actors: since 2005, this aspect of the decision has been repeatedly invoked by some and dismissed by others.

¹⁹³ See, e.g., Antonopoulos, *The Unilateral Use of Force* (n 129) 138-9; Mangu (n 130) 241; Ntoubandi (n 158) 172-3; and Verhoeven (n 145) 358-60.

¹⁹⁴ There has been extremely little academic legal appraisal of the use of force by the pro-Kabila States during the Great African War. However, within the small amount of literature on that question, the general view was that the actions of these States was lawful. See, e.g., Ben Chigara, 'Operation of the SADC Protocol on Politics, Defence and Security in the Democratic Republic of Congo' (2000) 12 *African Journal of International and Comparative Law* 58; Rupiya (n 184) 96-7; and Wilén (n 182) 102-6.

¹⁹⁵ See, e.g., *DRC v Uganda*, CR 2005/11 (n 43) 24-30 (DRC).

¹⁹⁶ See, e.g., *DRC v Uganda* (Counter-memorial submitted by Uganda) (n 67) [52-4].

¹⁹⁷ See the declaration of the DRC (then Zaire), reproduced in (1988-89) 43 ICJYB 95; and the declaration of Uganda, reproduced in Shabtai Rosenne, *Documents on the International Court of Justice* (2nd ed., Sijthoff & Noordhoff 1979) 407.

¹⁹⁸ See Green (n 138) particularly at 200.

¹⁹⁹ See, generally, *ibid*.

²⁰⁰ See Barbour and Salzman (n 144).