

# Evidence of Das Air operated flights between Uganda and the Democratic Republic of the Congo during the conflict

## A further response

30 September 2006

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### Introduction: provisions under the Guidelines

It is important, in the context of the Guidelines, for DAS Air explain why it was operating flights between Uganda and the DRC when these two countries were at war and to account for the cargoes of these flights. The fact that Das Air operated flights, using civil registered aircraft, have been identified as military flights by the Porter Commission; and the fact that the armed forces of Uganda have been judged by the International Court of Justice in violation of international human rights law, must engage provision II.2 of the Guidelines:

...enterprises should: Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.

The supply-chain provision under the Guidelines (II.10) is engaged by the UN Panel’s allegation that DAS Air was ‘transporting coltan from Bukavu and Goma to Europe via Kigali.’ The NCP is invited to determine a) whether DAS was in breach of the supply-chain provision (II.10) of the *Guidelines* in this case and b) what precise due diligence measures are suggested to companies who wish to comply with the Guidelines?

### 1. The question of evidence

DAS Air states that: “Significantly, RAID does not produce the evidence from the Porter Commission records on which it relies....If RAID has any credible evidence that DAS Air operated flights into the conflict zone, can they please produce it”.

RAID is at a loss to understand how DAS Air can be in denial of this evidence. The NCP will recall that RAID, in its submission of 07 March 2006, referred to and provided a CD containing scanned copies of Porter Commission documents and electronic copies of databases. The Porter Commission used these records in compiling its final report, confirming that the databases constructed by the Commission were ‘from Data provided by URA, Civil Aviation Authority and MOD’.<sup>3</sup>

DAS Air comments that: “This so-called “evidence” is fundamentally flawed for the reasons supported by the documentary evidence which I attach to this letter”.

DAS Air’s documentary evidence amounts to little more than internet printouts which attribute certain aircraft to other carriers at unspecified points in time, but which in no way addresses the evidence from the Porter Commission records that DAS Air was operating these aircraft during the conflict.

Of course, it is for the NCP to judge the relative worth and credibility of evidence from the Porter Commission and the material supplied by DAS. However, RAID would remind the NCP that the Porter Commission evidence was gathered and used as part of an official judicial inquiry under the Commission of Inquiries Act and that the Commission adhered to the Evidence Act in its proceedings. While DAS Air is dismissive of the Commission’s records, the International Court of Justice has acknowledged the evidentiary value of the Porter Commission.<sup>4</sup>

## **2. DAS Air’s failure to elaborate on individual flights**

### ***a. Missing information***

The Porter Commission identifies 50 DAS Air operated flights arriving in or departing from Entebbe, of which 35 were recorded as operating to or from destinations in the DRC.<sup>5</sup> Of these 35 flights, DAS has responded on 16. It has failed to provide any further information on or to account for the following 19 flights:

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<sup>3</sup> Republic of Uganda, ‘Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001,’ *Final Report*, November 2002, p. 38, lines 22 - 23 [hereafter ‘Porter Commission, *Final Report*’].

<sup>4</sup> International Court of Justice, Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 December 2005, Judgement, paragraphs 61 and 237. The Court moreover notes that ‘evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner.’ (paragraph 61).

<sup>5</sup> There is an additional flight between Entebbe and Kinshasa recorded by the Porter Commission as undated: this has been excluded from the totals.

<b>Date</b>	<b>In (from)</b>	<b>Out (to)</b>	<b>Registration</b>
24/09/1998	Kinshasa (FZAA)		5NARQ
29/09/1998	Kinshasa (FZAA)		5NARQ
23/10/1998	Kinshasa (FZAA)		5NARQ
24/10/1998	Kinshasa (FZAA)		5NARQ
07/11/1998	Lubumbashi (FZQA)		5NARQ
20/11/1998	Lubumbashi (FZQA)	Kinshasa (FZAA)	5NARQ
23/11/1998	Kinshasa (FZAA)		5NARQ
27/11/1998	Kinshasa (FZAA)		5NARQ
27/11/1998	Kinshasa (FZAA)	Lubumbashi (FZQA)	5NARQ
09/12/1998	Kinshasa (FZAA)	Lubumbashi (FZQA)	5NARQ
17/12/1998	Lubumbashi (FZQA)	Kinshasa (FZAA)	5NARQ
23/12/1998	Lubumbashi (FZQA)		5NARQ
24/12/1998	Lubumbashi (FZQA)	Kinshasa (FZAA)	5NARQ
25/12/1998	Kinshasa (FZAA)	Kinshasa (FZAA)	5NARQ
31/12/1998	Lubumbashi (FZQA)	Kinshasa (FZAA)	5NARQ
15/01/1999	Lubumbashi (FZQA)	Kinshasa (FZAA)	5NARQ
22/01/1999	Kinshasa (FZAA)	Kinshasa (FZAA)	5NARQ
23/01/1999	Lubumbashi (FZQA)	Kinshasa (FZAA)	5NARQ
12/02/1999	Kinshasa (FZAA)		5NARQ

Rather, DAS Air provides a blanket response to the movements of aircraft 5NARQ – which it confirms as a B707-300F series Boeing aircraft – stating that “DAS Air has repeatedly acknowledged that it flew into and out of Kinshasa and Lubumbashi” and that “Kinshasa and Lubumbashi *are not in the conflict area* or indeed anywhere near it” [emphasis in the original].

***b. Misleading the NCP over DAS Air’s knowledge of GAS Air***

RAID reminds the NCP that, in its letter to the NCP of 20 June 2005, Das Air originally denied knowledge of any of the activities of GAS Air (a former DAS Air group company) from September 1986 onwards. However, in its letter to the NCP of 21 September 2005, after being presented with information to the contrary, Das Air does finally acknowledge that: ‘5N-ARQ was leased by Das Air from GAS Air, Nigeria under GAS Air’s Nigerian AOC.’

***c. Misleading the NCP over flights between Entebbe and Lubumbashi and Kinshasa***

DAS Air originally stated that ‘Flights were made to Kinshasa and Lubumbashi ex Ostende on the Nigerian registered aircraft 5N-ARQ up until December 1998 - that is, not even during the period in

question.’ In other words, DAS Air denied making flights between Entebbe and Kinshasa and Lubumbashi and denied making flights after the stated date.

In fact, the Porter Commission records show that **31 flights of 5N-ARQ to and from Kinshasa and Lubumbashi, stated by Das Air as ex Ostende, were made from and to Entebbe, and beyond the stated date** over the period 24 September 1998 to 30 April 1999 and **during the conflict period.**

Despite the evidence from the Porter Commission records, DAS Air still does not explicitly acknowledge these flights. However, a close reading of the company’s most recent response reveals that: “DAS Air made flights to Kinshasa and Lubumbashi...*the vast majority of which* originated from Europe” [emphasis added]. In other words, this is a tacit admission that the company did operate flights from Entebbe to these destinations. The significance of operating civilian flights into a conflict zone is examined below.

### **3. Flying civilian aircraft into a conflict area**

It is implied by DAS Air that, because, in its view, Kinshasa and Lubumbashi were not in the conflict area, flights into these places were permitted.

All Das operated flights referred to by the Porter Commission – including those between Entebbe and Lubumbashi and Kinshasa – occurred when the airspace between Uganda and the DRC was closed. Indeed, in its letter to the NCP of 20 June 2005, Das Air itself acknowledges that airspace between the two countries was closed during the conflict. Given that the DRC and Uganda were at war, it is incorrect to assert that Lubumbashi and Kinshasa were not in the conflict area. **Either DAS Air was operating civilian flights illegally by both Ugandan law and international convention or else it too was adopting the fiction – referred to by the Porter Commission (see RAID’s response to the NCP of 7 March 2006, section C.2) – of falsely recording such flights as flights of State aircraft, again illegally.**

DAS Air’s flat denial that it was operating civilian flights as State aircraft must be set against the evidence provided by the Porter Commission. All Das Air operated flights are described in the Commission’s databases as military. The Commission’s records include flight logs from Entebbe Aerodrome: these too designate the majority of Das Air operated flights as military flights.

It is unfortunate that DAS Air chooses to characterise the presentation of the Porter Commission’s records of DAS Air operated flights that coincide with the illegal offensive by Ugandan forces condemned by the International Criminal Court as “hysterical nonsense”. The Porter Commission records show DAS Air operated flights into Bunia, Kisangani, Buta Zega, and Isiro Matari after these towns were taken by Ugandan forces. Set against this evidence is DAS Air’s denial and a few partial registration records for the aircraft involved that in no way establish that the same aircraft were not operated by DAS Air on the dates in question: see below. Once more, the NCP is reminded of the high standard of evidence gathered by the Porter Commission and its use of URA, Civil Aviation Authority and MOD data in compiling its databases.

## **4. Individual flights: DAS Air’s evidence versus the evidence in the Porter Commission records**

### ***a. Ownership and operation***

DAS Air chooses to respond on a minority of flights into or from the DRC – just 16 out of 36 identified by the Porter Commission as operated by the company. DAS Air states:

“The primary problem that RAID has is that it refers to flights that were operated on aircraft that were neither owned nor operated by DAS Air, as I demonstrate below.”

**Unfortunately, what is demonstrated by DAS Air is merely that these aircraft were not registered to DAS Air; the records fail to demonstrate who was operating them at the time.**

DAS Air refers to 13 flights by aircraft with registrations ZSLST, YRIMM, 3CKKC, 9LLBG, 9QCPQ and 5XRPR. In respect of each of these aircraft, the company states: “This aircraft has not at any time been owned, flown or operated by DAS Air in any manner, in any circumstances or at any time in its history, either before, during or after the conflict period”. However, the partial records appended by DAS Air, while they may show that these aircraft were owned or operated by another company at an unspecified point in time, in no way prove that the same aircraft were not operated by DAS during the period in question, as recorded by the Porter Commission. **The fact that DAS Air acknowledges that another aircraft (a Boeing 703, registration YRABA) was temporarily leased from Tarom, underlines the existence of arrangements whereby DAS operated aircraft belonging to other carriers.**

The NCP is reminded that, set against the inconclusive records provided by DAS Air, are the Porter Commission's records that attribute all 13 of these flights as operated by DAS Air.

Of the remaining three flights between Uganda and the DRC upon which DAS Air chooses to comment further, two relate to aircraft B703, registration YRABA. DAS acknowledges leasing this aircraft from Tarom (the national carrier of Romania) between 23 March 1999 – 25 March 1999 to fly between Ostende-Cairo-Entebbe-Accra-Ostende, stating that “DAS Air never at any time operated this aircraft to or from any part of the DRC.”

There is nothing to cause RAID to doubt the leasing of this aircraft from Tarom on the dates specified, although it would be pertinent for DAS Air to provide the NCP with copies of documentation that confirm this arrangement. However, set against the company's denial that it operated the same Tarom aircraft on 18 February 1999 and the 14 March 1999 into, respectively, Goma and Bunia, are the Porter Commission's records that show otherwise.

The final flight between Uganda and the DRC elaborated on by DAS Air is the Boeing 707 [identified in the Porter Commission annexes as a B703] aircraft 5NARQ, which flew from Entebbe to Kisangani on 30 April 1999. According to DAS Air, this flight was for Médecins Sans Frontières. The significance of the information provided by DAS Air in relation to this flight, in contrast with the total lack of information provided on other flights, is examined further in section 5.(b), below.

#### ***b. Use of the same registration number by different aircraft***

For 11 of the 13 flights referred to above, the Porter Commission records two registrations: the DAS Air registration 5NARQ, as well as the registrations ZSLST, YRIMM, 3CKKC and 9LLBG that DAS Air prefers to cite.

DAS Air states that ‘at no time has DAS Air used the same registration number for different aircraft’; yet its denial that RAID has produced documentary evidence showing otherwise is inexplicable.

RAID has provided Porter Commission records indicating that the registration 5NARQ, as well as being used by DAS Air's Boeing 707, is also used by the BE20 (Beechcraft Super King Air 200, alternative ZSLST), the IL18 (Ilyushin IL18, alternative YRIMM), and the two A748s (AIL 748, alternatives 9LLBG and 3CKKC).<sup>6</sup> The databases constructed by the Commission were 'from Data provided by URA, Civil Aviation Authority and MOD'.<sup>7</sup> Operating more than one aircraft under the same registration is contrary to the Chicago Convention. It should be remembered that DAS Air initially denied any knowledge of GAS Air and, by implication, aircraft 5NARQ.

## 5. DAS Air's failure to produce flight documentation

### *a. Flights plans and cargo manifests*

DAS Air repeatedly offers to provide "any information [RAID] may require regarding its [DAS Air's] flights", yet, to date, it has failed to produce flight plans and cargo manifests or other documentation except for one flight, i.e., the Médecins Sans Frontières flight, as detailed below.

Indeed, DAS Air describes RAID's request for flight plans and manifests between Uganda and DRC as 'wholly unnecessary and disproportionate'. RAID would remind the NCP that, for its part, it has provided copies of hundreds of pages of documentation from the Porter Commission annexes.

While noting DAS Air's invitation to inspect its archive, for reasons of efficiency and to allow for proper analysis, RAID asks that DAS Air simply provides copies of the documentation, either directly to RAID or to the NCP for RAID to inspect at the latter's offices.

RAID does not believe this request to be overly onerous. (i) DAS Air claims that the 'vast majority of its flights originated from Europe': RAID seeks information solely on flights between Uganda and DRC. (ii) Because DAS Air denies operating several flights, despite evidence to the contrary in the Porter Commission's records, the expectation is that DAS Air would only ever voluntarily release a limited number of documents in any case.

**Taking (i) and (ii) into consideration, RAID again requests flight plans and cargo manifests for all 19 flights of aircraft 5NARQ, listed under 2.(a) above, and the flight of aircraft 5XJET from Kigali to Entebbe of 4 December 1998.**

### *b. The exception: the Médecins Sans Frontières flight*

DAS Air does readily acknowledge that it owned and operated the Boeing 707 [identified in the Porter Commission annexes as B703] aircraft 5NARQ which flew from Entebbe to Kisangani on 30 April 1999, providing copies of Flight Fixture Advice and messages showing that it was delivering supplies on behalf of Médecins Sans Frontières Belgium. **Why has DAS provided documentary evidence about the purpose and cargo of this flight and not for the other 29 departures and arrivals of this aircraft between Entebbe and destinations in the DRC?**

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<sup>6</sup> In addition, on several occasions the Porter Commission records attribute the registration 5NARQ to a B703 aircraft: it is probable that this is short-hand for a Boeing 707-300. Please see Annex 2 of RAID's submission of 7 March 2006 for further details.

<sup>7</sup> Republic of Uganda, 'Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001,' *Final Report*, November 2002, p. 38, lines 22 - 23 [hereafter 'Porter Commission, *Final Report*'].

## 6. Flights to Kigali, Rwanda, and the coltan trade

DAS Air acknowledges the flight of a Boeing 707, registration 5X-JET, from Entebbe to Kigali, Rwanda, on 4 December 1998, describing it as “one of DAS Air’s regular scheduled destinations from Europe and Entebbe”. Beyond this reference to the Kigali flight, DAS Air makes no response to the issues raised by RAID in relation to the coltan trade in its March submission to the NCP.

The original UN Panel allegation was that:

DAS Air, a Ugandan-owned freight company, is also believed to be transporting coltan from Bukavu and Goma to Europe via Kigali.

[UN Panel Report, 13 November 2001, paragraph 20]

RAID notes once more that Das Air, in its reply of 21 September 2005, acknowledges that:

- It continued to transport coltan from the region until December 2001, despite the fact that such traffic in coltan had been condemned by the UN Panel in its report of 12 April 2001.
- Das Air's justification for its continued role in the coltan supply-chain was its ignorance of the UN Panel's report.
- That it believed that the coltan that it was exporting from Kigali came from Kigali.

RAID would also remind the NCP of the very different view held by the UN Panel at the time:<sup>8</sup>

The Panel has gathered information showing that linkages between different actors and stakeholders are very well structured to the point that Governments and large reputable companies operate in confidence. In the case of coltan, all the needed documentation for its export is provided in Kigali, but there are accomplices in Kinshasa in the Ministry of Mines. The importing companies and their facilitators are aware of the real origin of the coltan, however.

It would appear that Das Air did nothing to ascertain the real origin of the coltan that it was exporting. **It is submitted that DAS failed to conduct business in a manner that was compliant with the *Guidelines* in that it failed to carry out any due diligence and it continued to transport coltan when knowledge of the illegal exploitation of coltan in the DRC was in the public domain.**

Notwithstanding the indirect transportation of coltan from the DRC via Kigali, **the Porter Commission records show a Das Air operated flight direct to Goma from Entebbe on 18 February 1999.** This is the Boeing 703 aircraft, registration YRABA, which DAS Air acknowledges leasing on other dates from Tarom. DAS Air denies owning, flying or operating this aircraft on the flight into Goma on the date identified by the Porter Commission. Once more there is contradiction that the NCP will need to resolve: the Porter Commission’s evidence set against DAS Air’s denial.

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<sup>8</sup> UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo, S/2001/357, 12 April 2001, paragraph 182.