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Introduction

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III. Current Legal Issues in the Great Lakes Region of Africa

Introduction

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The two articles that comprise the special section that follows are, from a legal perspective three separate and distinct current issues in the Great Lakes region of Africa. Dr. Obote-Odora examines how the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) has interpreted Article 4 of the statute establishing the tribunal. Kasaija Phillip Apuuli considers the legal implications of Uganda's military engagement in the Democratic Republic of Congo (DRC). While each article discusses interesting and important developments in one part of Africa, it is hard to identify a common element or theme notwithstanding that the two articles deal with places that are geographically close. Upon further reflection, however, it becomes evident that what links the two articles is the common effort the authors make to treat the problems under review as technical legal issues or at least as issues that deserve to be analyzed from a technical legal perspective.

That such efforts are being made is potentially important because there is a pressing need to reinforce the rule of law and the objective application of law in Africa. This is crucial to the economic and social development of Africa. It is hard to imagine the kind of foreign investment Africans want or improvement in human rights that they increasingly demand without first more firmly establishing respected, reliable legal mechanisms. This is the premise that those of us who helped develop the Great Lakes Justice Initiative (GLJI) in the late nineteen nineties held. Under this Presidential initiative, the US is providing assistance in Rwanda, Burundi, and the DRC to strengthen the rule of law, legal institutions and protection of human rights.

The issues identified by the authors of the three articles which follow entail a complex mix of political, social, security and economic elements. The authors of the articles have introduced legal factors that should also be considered. To the extent that the problems of the sub-region can be dealt with as legal rather than political or military issues, there may be a greater ability to reduce the volatility of the specific issues and the overall instability of the Great Lakes region.

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In his article on the prosecution of war crimes by the ICTR, Dr. Obote-Odora reviews the trial records of five cases; notes the role of the United Nations Security Council in establishing the ICTR; compares decisions of the International Criminal Tribunal for Yugoslavia (ICTY); and considers what actually happened in Rwanda at the time of the genocide that led to the several arrests covered in the trials being reviewed. Dr. Obote-Odora notes that the ICTR has yet to convict anyone charged with committing war crimes in the 1994 internal armed conflict. In the cases being reviewed, he notes, the Trial Chambers reasoned that the culpable acts of the accused were not a component of the internal armed conflict and were therefore not a violation of Article 4 of the ICTR Statute, i.e., the culpable acts did not constitute war crimes. Stating that he is not concerned with the correctness of the decision of the Trial Chambers or of the wisdom of the court's interpretation of Article 4 of the Statute, Dr. Obote-Odora, nevertheless, raises serious questions regarding the decisions and the court's interpretation of the Statutes. As I read him, he believes the court's decisions contradict what actually happened in Rwanda in 1994, and he believes that more imaginative legal interpretations were called for.

In effect, Dr. Obote-Odora reminds readers seven years after the events of the sheer brutality and cruelty of what the perpetrators were alleged to have done. The events of the early nineties in former Yugoslavia and Rwanda had a tremendous emotional impact around the world. The decisions to establish the ICTY and ICTR reflected a certain collective chagrin over the failure of the international community to quell these crises earlier and before they reached genocidal proportions particularly in Rwanda. At the same time it was felt that the tribunals had to meet the highest judicial standards if they were to gain a level of credibility and international respect that matched their daunting responsibilities. It is interesting to compare these reactions to the reactions of the international community to somewhat analogous events earlier in Iraq and Cambodia. It is also interesting and perhaps more important to consider the implications for the future, e.g., with respect to Burundi and/or the DRC, should the international community decide to conduct trials for violations of international humanitarian law with respect to events in those countries during the latter half of the 1990s.

Thus, it is interesting to note the decisions reached by the trial chambers in the ICTR with respect to war crimes notwithstanding the intense emotional and political environment surrounding these cases. That the judges could make the kind of distinctions Dr. Obote-Odora cites under these circumstances is encouraging to the extent that it shows that the judicial process was conducted somewhat immune to the emotions of the moment. Whether the reasoning behind the decisions may have been flawed and could have unwanted implications not only for the ICTR and the ICTY but in other future tribunals as well remains

to be seen. The decisions of the Trial Chambers where the defendants were usually found guilty of genocide demonstrates that they did not "get away with murder" even if they were found not guilty of war crimes, narrowly defined.

The paper by Kasaija Phillip Apuuli of Makerere University in Kampala addresses the international law issues that Uganda's engagement in the DRC raises. After reviewing the arguments pro and con, Professor Apuuli does not really reach a straightforward "guilty as charged" or "not guilty" conclusion. He does provide information regarding the background to Uganda's military involvement in the DRC. He examines at some length the specific arguments regarding the legality or illegality of Uganda's actions. He also noted, for example, the preliminary findings of a United Nations panel that was charged with investigating whether Uganda and other foreign forces in the DRC have inappropriately exploited natural resources in the Congo. Professor Apuuli also raises a question of whether the arguably legal deployment of troops in the Congo is somehow nullified by how deeply into the country they penetrated. In short, Professor Apuuli provides a considerable amount of information and discussion of the issues raised by Uganda's recent history in the DRC, but he rarely draws final conclusions.

The issues raised by Uganda's military engagements in the DRC up to now have been addressed in a variety of ways. Kinshasa and its allies, notably Zimbabwe and Angola, have responded militarily and politically. However, there has also been an important diplomatic response culminating in the 1999 Lusaka Accords which established the framework for the ultimate withdrawal of foreign troops as well as a new national political structure in the Congo, following what has come to be called the National Dialogue. The political/diplomatic situation is vastly more complicated, however, by several factors.

Whatever, Uganda's role in and since 1998, it is generally accepted that the single most important proximate cause of the current war in the Congo was Rwanda's perception that Laurent Kabila, who Kigali helped install as DRC President a year earlier, could not or would not control the remnants of the former Rwandan military and its allied militia (generally referred to as the ex-FAR/Interahamwe), who were threatening the Rwandan homeland from the DRC. As Professor Apuuli notes, Uganda had similar concerns both with respect to Ugandan rebels threatening Uganda from bases in the DRC and also out of concern over the ex-FAR/Interahamwe's association with the perpetrators of the 1994 genocide in Rwanda. It has been understood by most participants that the Rwandans, at least, were unlikely to withdraw from the DRC until and unless the threat from the ex-FAR/Interahamwe ended, however, that was accomplished.

There has been considerable progress in moving towards the goals of the Lusaka Accord, albeit very slowly. By late 2001 there is in place a cease-fire agreement that, for the most part, has held. A UN-Sponsored international observer force (MONUC) is in place. There is general acceptance by virtually all of the relevant parties that a national political dialogue will take place in the DRC. Preliminary meetings of the key parties were held prior to the formal dialogue meetings in April 2002. Two preliminary meetings of the key Parties have been held with a third expected in January. However, there has been virtually no movement in disarming, demobilizing, repatriating or resettling the ex-FAR/Interahamwe or other foreign irregular forces. (In Lusaka parlance these are referred to as "negative" forces.) In addition there have been radical realignments of the anti-DRC rebel forces reflecting a substantial deterioration of bilateral relations between Uganda and Rwanda. Another new element has been the increasing significance of local Congolese anti-Rwandan militias called Mai Mai.

This very sketchy and incomplete summary is meant to convey the extremely complex situation on the ground in the Congo. Nor have I mentioned the complications arising from the massive humanitarian disruptions or the sudden attention given to the mining of coltan in eastern Congo. Moreover, by now some countries like Chad and Namibia have withdrawn all their forces. While Joseph Kabila has been more forthcoming than his father, Laurent Kabila, who drove Mobutu from power, his legitimacy rests on shakier ground since no generally accepted succession mechanism was in place when in January 2001 Laurent Kabila was assassinated.

Given the extreme complexity of the situation in the DRC and in the Great Lakes more generally, one wonders how, indeed, to determine whether Uganda's actions were or were not "legal." Two fairly simple arguments can be made: (a) it was an illegal use of force; or (b) it was self-defense and therefore the legal use of force. At present it seems more likely that the terms of the Lusaka Accords, as endorsed by the UNSC, will be where people will go to judge the actions of the parties to the agreement.

Uganda could be challenged in other ways, although it is hard to say by whom and in what forum. It is possible, for example, that at one point either the government in Kinshasa or private interests could seek damages, for example, for environmental degradation or for some other war related action. Already there have been calls for Rwanda and Uganda to pay for the substantial damage their forces caused in Kisangani, Congo's third largest city, during the clashes between the two occupying forces in 2000. Thus, one question is: Did Uganda have a legal right to send troops into Congo as a matter of self-defense? As noted, Professor Apuuli considers the pros and cons but does not make a judgment. I think by now a more likely question will be: Did Uganda

ONCE IN THE CONGO AND WHILE IT WAS THERE act in a criminal or negligent way and as a result be culpable for damages or punishment of one kind or another. This question can be posed for any or all of the countries which sent troops into the Congo. It remains to be seen if, at any point in time, either a government in Kinshasa, private Congolese, or others claiming injury will step forward to raise that question and in what forum.

A review of the two articles, which follow, reveals broad ways that the tumultuous events of the last decade in the Great Lakes will impact on the legal and judicial systems of the region. As indicated in the Obote-Odora and Apuuli articles, the events themselves have generated issues that, at a minimum, raise important legal issues. In the case of the Rwandan genocide, the international community, at some considerable expense, has established a new institution to deal judicially with the crimes that were committed. So has Rwanda, notably in deciding to handle a substantial portion of the cases through a modified traditional mechanism known as gacaca. Outside the region in the US, Canada, and Europe decisions have been taken regarding how to handle specific genocide-related cases, the most dramatic of which was the decision to try four Rwandan Catholic nuns in Belgium. In the process a body of law and procedure is being developed, as is true in the Yugoslav context as well. Exactly what precedential impact these cases have remains to be seen, but it seems likely that there will be a cumulative effect by the specific political, administrative and judicial decisions that are being made now.

In short, it is necessary if the instability of the Great Lakes region is to be overcome to address fundamental legal issues and judicial needs as well as the complex, interrelated economic, social and political issues that until now have attracted more attention.