PREFACE: STUDYING THE *ARMED ACTIVITIES* DECISION

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I. THE SIGNIFICANCE OF THE *ARMED ACTIVITIES* DECISION FOR CONTEMPORARY INTERNATIONAL LAW

The decision of the International Court of Justice (ICJ) in *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Uganda),[1] issued on December 19, 2005, has been the subject of a trickle of thoughtful commentary.[2] But in the years immediately following its issuance, this decision received much less scholarly attention than did the Court's decisions in some other cases, including those in which the scale of the military force and human misery involved was not nearly so great. It is not difficult to conceive of reasons why this case has drawn much less scholarly engagement than other decisions concerning the use of force, particularly the *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America)[3] judgment of 1986 and the *Oil Platforms* (Islamic Republic of Iran v. United States of America) judgment of 2003.[4] In global jurisprudence, outside a small group of African scholars, African affairs receive less weight and critical consideration than they merit—a phenomenon mirrored in most spheres of academia, media, and policy punditry.

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1. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19) [hereinafter Armed Activities].

2. An excellent example is Phoebe Okowa, *Congo's War: The Legal Dimensions of a Protracted Conflict*, 77 BRIT. Y.B. INT'L L. 203 (2006).

3. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

4. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

A further element in this case is the vast complexity of the conflict in question.[5] This complexity compounds the relative epistemic as well as physical inaccessibility of the area to lawyers working from abroad, and makes for concomitant messiness in the judicial opinions on Democratic Republic of the Congo (DRC) issues in the ICJ. The factual matrix is infinitely more complex than even that of the *Military and Paramilitary Activities* case, which dealt with both state and non-state actors. In comparable early cases, the lines of the conflicts themselves were well delineated regardless of the side any particular outside commentator was on: Divisions on the *Military and Paramilitary Activities* case in many respects reflected the Cold War; and the distribution of actors in the *Oil Platforms* case imitated the certainties of the Cold War era in a number of ways. Complexity in *Armed Activities*, on the other hand, is not limited to establishing the ideological and practical affiliations of the actors. The issues of applied morality and justice implicated in the case can be as perplexing as the issues of fact are messy.

Finally, there is an additional somewhat uncomfortable factor that may contribute to the difference in the quantity of scholarly examination: In the *Military and Paramilitary Activities* and *Oil Platforms* cases, the United States was a party. The sociology of the profession creates more and less understandable reasons why that fact alone ensures heightened attention to a legal proceeding. The Democratic Republic of the Congo? Uganda? For better or worse, they are not quite the same global legal celebrities.

Yet the *Armed Activities* case touches in more significant ways than its predecessors some of the most challenging legal dimensions of contemporary use of force in international life, as well as the no less important question of the ability of the ICJ to adjudicate these matters. Prominent among these challenges is the further erosion of "the state" as the primordial legal unit in such cases. Already in *Military and Paramilitary Activities* the issue of irregular forces was at the center of the dispute. But the empirical context of these irregulars was

5. Multiple sub-structures of violence are subsumed in references to the "Congo conflict." Cross-border dimensions of the conflicts in the eastern Democratic Republic of the Congo (DRC) merge into the congeries of issues known as the "Great Lakes dispute."

statal surrogacy, and the concomitant legal issue was statal attribution under the legal regime of the lexically significant doctrine of *state* responsibility. One of the least satisfying doctrinal aspects of that decision was the conceptual vacuum left once the court failed to attribute to Nicaragua responsibility for rebel incursions into El Salvador. It appeared that once that lack of state responsibility was established, international law—at least international law as the ICJ with its structure and jurisdiction could articulate it—had reached the limit of its universe, or had hit an empty space.

Contemporary life, as illustrated all too well in the Great Lakes disputes, force us to confront that apparent limit.[6] In many places, particularly those in conflict, the conceptual clarity of a civil war or the political neatness of Cold War surrogacy no longer capture the situation as it exists. Jurists must deal with territorial units which formally constitute states but functionally are not, and with an array of irregular forces which transcend such boundaries. Similar issues emerge in relation to the humanitarian law of armed conflict when exploitation of economic resources in resource-rich territories takes center stage; for in this context such exploitation is not a subsidiary question of occupational rights but may go to the heart of the conflict—may even at times be its ugly *causus belli*.

There is an additional oft-overlooked dimension to the new reality which *Armed Activities* represents. Compared to the earlier cases, where the political realities were such that United Nations (UN) involvement was limited—often little of direct significance beyond Security Council Resolutions with differing legal effects—the Congo conflict has been the continuous terrain of active pacification efforts by the international community generally and the UN more specifically. The Court could not simply look back at the conflict and post facto draw legal conclusions in isolation based on analysis of the conduct of the parties and other local actors. It inevitably had to take cognizance, in its findings of fact and its legal rulings, of the past and continuing activities, agreements, and conclusions reached by other agencies of varying authoritative-

6. The war fought in July–August 2006 between Israel and Hezbollah, which could not sensibly be straight-jacketed into an Israel versus Lebanon appellation, is one of many situations of violence in which the conceptual challenges posed by the Great Lakes violence finds comparators.

ness within the UN system of which the Court is itself a part. Put more strongly, in the DRC and Great Lakes context, the Court itself becomes part of the continuing UN process.

It is with these and similar considerations in mind that we decided to dedicate part of the Institute for International Law and Justice (IILJ) Advanced International Law Seminar at New York University (NYU) School of Law to the study of the Great Lakes conflict and specifically to the *Armed Activities* decision of the ICJ. We invited some of our student-scholars to focus their research and writing on assigned aspects of the case. Four of the papers are published in this issue of the NYU *Journal of International Law and Politics*.

II. Perspectives on the Judgment: A Summary of the Articles

Although the ICJ is at its best when the factual matrix of the dispute before it is largely agreed upon and it can sit, in essence, as a court of law rather than a tribunal to determine opaque and hotly disputed issues of fact, *Armed Activities* is another in a line of cases in which it has had to dirty its hands with difficult fact finding. This is, however, the most complicated and challenging of these cases to have gone to judgment. Whether the Court is ideally suited to carry out such extensive fact finding given its structure, the services available to it, the background and experience of its judges, and similar factors is doubtless open to question.[7] Lacking a first-instance tribunal within its own structure, the ICJ usually does not have available to it findings by other fact-intensive international tribunals or the work product of a robust investigative international civil service. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia & Herzegovina v. Serbia & Montenego) decision of February 2007,[8] the ICJ drew upon factual findings and legal analysis made by the International Criminal Tribunal for the Former Yugoslavia with regard to the same underlying atrocities. By its

7. For a general discussion, see Ruth Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice*, 6 L. & Prac. of Int'l Cts. & Tribunals 119 (2007).

8. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26).

very rarity, the substantial use in that case of reliable and judicially-formulated materials from another tribunal highlights the extent of the limitations the ICJ usually faces. In the majority of fact-intensive cases, and acutely so in the *Armed Activities* case, the ICJ has little choice in reaching factual conclusions but to give weight to non-judicial inquiries by intergovernmental bodies, to judicial decisions or judicial-type inquiries by national bodies, and even to certain nongovernmental organization or journalistic materials.[9]

This reliance on third-party sources establishes problematic incentives for future conflicts. UN inquiry teams and peacekeeping forces, and perhaps also special rapporteurs and expert panels, will view their own responsibilities differently—and certainly may be viewed differently by local parties—if it is known that reports they make from conflict zones that are expressly aimed at facilitating political settlement or amelioration of abuses may also be used in determining legal responsibility and liability years later. National governments may be more leery of setting up serious public inquiries into wrongdoing of their own personnel, as the Ugandan Government did in creating the Porter Commission, if they know that facts established there may be used not only by the state in question and its public but also by international courts in ruling against the state. Even foreign journalists may be viewed with more suspicion by governments if it is known that their reports are likely to be utilized not only in international criminal proceedings, which tend to be rare and to require more thorough evidence, but also in state responsibility cases.

Simone Halink's Article wrestles with the problems of evidence, fact-finding, and burden and standard of proof in such cases. There are no easy solutions. She recommends that the ICJ consider establishing pre-trial chambers specialized in evidential matters and perhaps U.S.-style special masters. She suggests that the ICJ might structure its rules and procedures so that at the beginning of each fact-intensive case it can set

9. Whether too much weight was given to some of these sources is a matter addressed in a careful and illuminating fashion in the dissenting opinion of Judge James Kateka, the experienced Tanzanian diplomat and International Law Commission member appointed as ad hoc judge by Uganda. *See* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 47, 52-53, 60 (Dec. 19) (dissenting opinion of Judge Kateka).

the expectations of the parties correctly by defining case-specific burdens of proof. The Court may be able to leverage these and other rules to encourage the parties to cooperate with its inquiry by producing evidence that they already possess or can obtain. More generally, Halink recommends elaboration of a general code of fact-finding practice for non-judicial UN bodies, in the formulation of which jurisprudence of the ICJ and other tribunals is likely to be influential.

Turning from these process matters to the substantive law, Stephanie Barbour and Zoe Salzman address the legal problems posed by attacks committed in Ugandan territory by militia groups operating from DRC territory. They agree with the ICJ that state responsibility for these attacks was not attributable to the DRC—the DRC state was so weak in the east of the country that attribution of responsibility to it would have been a counterproductive legal fiction. But, they argue, Uganda should still have been regarded as entitled to use force in self-defense against armed attacks by such groups; and, in view of failure of the territorial state (in the sense of the near-total incapacity of the DRC to exercise control in Ituri), Uganda's self-defense right could be lawfully exercised in those areas (as a last resort and subject to other caveats) without permission from the DRC government.[10] Their argument, like those of the other Articles in this issue, engages closely with several separate and dissenting opinions of different judges. Such use attests to the value for the ICJ of this mode of judicial expression, provided it accompanies, as in this case, a well-crafted and coherent judgment of the Court, even if that judgment is limited in scope.

The ICJ's approach to the Lusaka Agreement of July 10, 1999, a peace agreement signed by the six states most directly involved in the conflict and to which two of the leading groups rebelling against the Kabila government soon became formal parties, is the subject of Andrej Lang's Article. For what Lang suggests are at least two understandable reasons, the ICJ characterized this agreement as a modus operandi rather than as an instrument comparable in international legal effects to a

10. In March 2008, Colombia attacked a camp of the anti-government Revolutionary Armed Forces of Colombia (FARC) in a remote jungle region of Ecuador under a similar theory, provoking considerable inter-state discord in the region.

treaty. The Court was hesitant about permitting such agreements, often made in coercive conditions or otherwise under the pressures of war rather than with future legal responsibility in mind, to prospectively or retrospectively legalize or immunize grossly illegal conduct. It was also concerned that giving such agreements a more formal international legal status might confer a status on their non-state parties that was neither intended by some of the states involved nor desirable from the standpoint of other external actors, such as the UN. Lang argues, however, that on balance the results achievable through intra-conflict peace treaties are likely to be much more positive and valuable if these can create direct effects in international law.[11] To this extent, he contests arguments made for a *lex pacificatoria* that might take such agreements outside the ordinary operation of general international law.

Struggles for control of lucrative natural resources have motivated much violence in and around the DRC, and wealth from these resources has enabled groups to fight for any number of other objectives. The ICJ's treatment of this dimension of the *Armed Activities* case is discussed in Robert Dufresne's Article. The ICJ rejected the DRC's argument based on the international law doctrine of permanent sovereignty over natural resources (PSNR),[12] commenting that this principle of customary international law is not applicable to such a situation. Dufresne welcomes this decision, pointing out that the state's PSNR has been used in the Congo (Zaire), as in other postcolonial countries, to justify monopolization of resources by a tiny elite in the name of the state. He argues for a rejuvenation of the PSNR principle so that it does not buttress grotesque societal inequalities. Dufresne also lauds the ICJ for articulating both some legal responsibilities of an occupying state for resource exploitation it commits or fails to prevent and some prudent limits to these state responsibilities. That the decision has little to say about exploitation outside of military occupation, particularly exploitation by warlord militias of private corporations, he sees as sensible judicial economy

11. Note the legal effects that would have been given to the Lusaka Agreement and comparable subsequent agreements under the analysis in the separate opinion of Judge Parra-Aranguren. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 2-20 (Dec. 19) (separate opinion of Judge Parra-Aranguren).

12. Armed Activities, *supra* note 1, ¶ 244. **R**

given the findings against Uganda rather than as over-abundance of caution.[13]

Each of these Articles repays careful study in its own right. It is only by considering the multiple facets of this dense and difficult case that its full significance, a significance rooted in the limitations as well as the accomplishments of the court's decision, can be appraised.

III. Other Issues Arising from the Court's Judgment

In addition to the points raised in these Articles, *Armed Activities* raises numerous other issues of profound importance that are not covered here, some of which have troubling implications. The criteria for determining when a military occupation has occurred is a difficult legal problem and an area in which the Court's approach raises concerns. In this case, the Court decided that Uganda had been in occupation of Ituri province—all of that province—and nowhere else.[14] Some fear that the Court's test makes states too readily into occupiers where, as here, much of the effective control was in fact exercised by militias not always acting at the behest of the "occupying" state's officials. Others fear that the Court's test is too lenient on interveners: The Ugandan army was deployed in many other parts of the DRC, exercising effective control, yet the Court did not think the occupier's duties under the law of occupation were triggered by this. Will other states be encouraged to follow this precedent, deploying forces to fixed positions for long periods, and directly affecting the lives of local civilians, but denying that they bear the legal duties of the occupier?

Delicate questions of adjudicatory process are also implicated by this case, not least the problems of dealing with damage resulting from illegal acts of two or more states that clash on the territory of a third. In this case, the ICJ found in separate proceedings brought by the DRC against Rwanda that it did not have a basis for jurisdiction in relation to the relevant issues. The ICJ did, however, consider among the DRC's

13. *See generally* Phoebe N. Okowa, *Natural Resources in Situations of Armed Conflict: Is There a Coherent Framework for Protection?*, 9 Int'l Community L.R. 237 (2007).

14. Armed Activities, *supra* note 1, ¶¶ 176-177. We thank Eyal Benvenisti for comments on this issue. R

claims against Uganda those relating to the mini-war in Kisangani in June 2000 between Rwandan and Uganda forces, in which much of the damage could not definitively be attributed to one side or the other.[15] The ICJ dismissed Uganda's claims that Rwanda was a necessary party and that the case could not proceed against Uganda alone. This decision, construed narrowly, was understandable, as the Court was determining the merits of the case against Uganda on the specific facts and it was unlikely that Uganda could make an exculpatory plea relating to Rwanda.[16] The reasoning, however, would not necessarily extend so easily to a remedies phase, where Uganda might seek to show that specific damage was solely attributable to Rwanda's actions. To date, all ICJ cases on the necessary parties rule relate to admissibility of the case with regard to determination of responsibility, not to determination of liability once responsibility has been established. The Court has thus left open the questions of which states are necessary as parties for the purposes of ruling on liability, and whether the conduct of non-party states may be prejudicially referred to by the Court in the liability phase. In so doing, the ICJ may generate political pressure on all states involved to negotiate a settlement because of the risk of an adverse outcome if the liability issues are adjudicated by the Court.[17]

A puzzle about the case is that the UN and other political actors did not seem to make political preparations ahead of the Court's judgment, nor do they appear to have integrated the ICJ's proceedings into the ongoing high-stakes peace process, even though the Court grappled with the governance of the past wrongs and future ways forward in the Great Lakes area. A contrast may be drawn with the 2002 Cameroon–Nigeria land and maritime decision of the ICJ.[18] In that case, the UN was fully alert to the likely implications of a deci-

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15. *See, e.g.*, S.C. Res. 1304, U.N. Doc. S/RES/1304 (June 16, 2000) (expressing the Security Council's "unreserved condemnation of the fighting between Ugandan and Rwandan forces in Kisangani in violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo").

16. For example, Uganda likely could not claim justifiable self-defense in Kisangani against Rwandan attacks.

17. IILJ Scholar Tara Mikkilineni contributed thoughtfully on these issues in the seminar.

18. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig., Eq. Guinea intervening) 2002 I.C.J. 303 (Oct. 10).

sion on the Bakassi peninsula issue for inter-state and intra-state relations, particularly were Nigeria to lose on this issue (as indeed happened). UN Secretary-General Kofi Annan met with the Presidents of both states in advance of the judgment to secure public commitments to comply with the Court's ruling, and the Security Council made careful preparations to add its support for the Court's decision. Despite considerable internal political opposition and a risk of inter-state war, Nigeria peacefully withdrew from the territory in 2006. In the *Armed Activities* case, by contrast, key actors in the UN processes in New York and in the Great Lakes region seem to have been largely oblivious of the Court's judgment. The prospects of a remedies phase or of a settlement of the case do not seem to have figured very prominently even in the most legally-detailed of the agreements of the Great Lakes peace process.[19]

The judgment in *Armed Activities* and the separate and dissenting opinions also contribute to the jurisgenerative process on many more specific legal issues. In tipping, at least at the level of broad abstractions, toward complementary application of the bodies of law often designated by the labels "human rights law" and "humanitarian law of armed conflict," the Court continues a move away from the idea of international humanitarian law as having a primacy as the *lex specialis* of armed conflict situations. In urging that the ICJ should have treated the DRC as having a legally cognizable obligation to respect the basic rights of persons subject to abuse at Kinshasha airport, even if they were not Ugandan nationals, Judge Simma argued plausibly for a kind of ancillary jurisdiction arising from the Court's jurisdiction over connected issues between the DRC and Uganda which had been established by the consent of the parties. Judge Simma posited an ancillary jurisdiction that did not depend on Uganda having a traditional legal interest in the persons in question nor indeed on Uganda having actively pursued such a claim.[20] Judge Verhoeven argued (unconvincingly, in our view) for the desir-

19. *See* International Conference on the Great Lakes Region, Pact on Security, Stability, and Development in the Great Lakes Region, Dec. 14–15, 2006, 46 I.L.M. 175 (2007).

20. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 16-41 (Dec. 19) (separate opinion of Judge Simma).

ability of integrating the reparations and merits phases so that the merits judgment would not be simply declaratory. In so doing, he touched briefly on the fundamental problems of justice that would arise from a very large damages award against the state of Uganda, as the judgment would have to be paid by its people, many of whom are poor and had no part in the government's wrongful actions.[21] He offers no real solution, but the comment is a reminder that state responsibility can mean collective public responsibility, with the implicit paradox that such responsibility might seem more warranted rather than less in a democracy where the government is more representative of the people.

Several of the judges, including Judges Simma and Elaraby, argued that the Court should have made a finding that Uganda committed aggression.[22] This could have had implications for the ongoing attempts to define aggression for purposes related to the Statute of the International Criminal Court. Given the political tensions within that lawmaking process, it is unsurprising that the ICJ did not explicitly address the question of aggression. Its reference to a military intervention "of such magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4 of the [UN] Charter,"[23] may, however, be read as providing terminology intentionally suited for use in the political process of lawmaking on a crime of aggression.

The *Armed Activities* case demonstrates the cross-pollination of what are often erroneously considered to be discrete fields of international law. The IILJ program at NYU aims to provide students with the tools to grapple with just such instantiations of the current practice of international law through systematic advanced-level training for J.D., LL.M., and doctoral students committed to integrating and drawing deep connections between diverse areas of international law and other

21. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 5 (Dec. 19) (declaration of Judge ad hoc Verhoeven).

22. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 2 (Dec. 19) (separate opinion of Judge Simma); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 1 (Dec. 19) (separate opinion of Judge Elaraby).

23. Armed Activities, *supra* note 1, at ¶ 165. **R**

branches of knowledge. Its design reflects a belief that a good international trade lawyer should also understand social policy issues; a climate change lawyer should understand global financial regulation and security issues; and an expert in investment arbitration should know how human rights litigation is conducted. Students participate in major faculty-led research programs[24] and in intensive seminars that straddle hermeneutic and topical boundary lines. The papers published in this Special Issue reflect the work of one such seminar.[25]

This brings us to a final comment from the standpoint of legal education as a vocation. The value of the intensive collective study behind symposia such as this is not only to be measured in the eventual contribution to scholarship but also in the per se educational value of the process. We discussed the case in the seminar. We discussed the various draft papers, from which these were selected, in a weekend retreat. In this setting, we the teachers learned as much as we taught. Sometimes in the hurly-burly of modern life we consider solitude or a monastic setting—cell, scholar, book (and computer)—as the ideal condition for *La Vita Contemplativa* and the written product the prized fruit of such pursuits. Learning together is a noble practice which has ancient roots, and the oral tradition of teaching and learning has a distinguished scholastic pedigree. The method of this symposium and its results vindicate in our eyes both traditions. As for others, so for us: This is our way.

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24. Such as the Global Administrative Law project, which includes a number of frequently cited papers by students and recent graduates. *See* Institute for International Law and Justice, Global Administrative Law Project, http://iilj.org/GAL/default.asp (last visited Mar. 6, 2008).

25. We thank all the seminar participants for the quality of their comments, and Surabhi Ranganathan for her assistance as Rapporteur. We are grateful for the excellent work of Zoe Salzman, Tara Mikkilineni, and the *Journal of International Law and Politics* editors and staff in commenting on and polishing the final texts of these papers for publication.