

the years, the city's large Jewish population experienced recurring bouts of vicious anti-Semitism, culminating with mass deportation and murder during the German occupation. Many of the city's non-Jewish leaders and intelligentsia were also arrested, deported, or executed as rulers periodically changed through the years.

Why does this history matter? The history of this one mid-sized Polish town illustrates in microcosm the terrible human consequences that too often follow from a lack of secure and settled borders, particularly when ambitious neighbors seek to redraw them by force

## THE “WHAT ABOUT ME?” QUESTION IN ICJ PROCEEDINGS ON COMPENSATION AND MARITIME DELIMITATION

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### I. THE ICJ AND THE “WHAT ABOUT ME?” QUESTION

This brief contribution contains some reflections on the relevance of the “what about me?” question in proceedings on compensation and maritime delimitation. The focus is on disputes at the International Court of Justice (ICJ or Court). My argument is that, as things currently stand at the ICJ, the Court is ill-equipped to address the “what about me?” question and that, as a result, ICJ proceedings remain very much state-centric. This view likely is not surprising because the Court was conceived, since its origins in the 1920s, as an interstate judicial organ. Other dispute settlement institutions have developed since then to bring dispute settlement closer to individuals, such as regional human rights courts and arbitral tribunals in the investor-state context. However, this situation does not mean that the ICJ should not take into account individuals in deciding disputes submitted to its jurisdiction. What this situation does mean is that one would need to rethink some procedural aspects of ICJ dispute settlement, which I will discuss in relation to compensation, and parts of the ICJ's jurisprudence, which I will discuss in relation to maritime delimitation.

### II. COMPENSATION

On February 9, 2022, the ICJ handed down its judgment in the compensation phase of *Armed Activities on the Territory of the Congo (DRC v. Uganda)*. This judgment signals the end of the dispute between the DRC and Uganda originating from the armed conflict between the two states that straddled the end of the 1990s and the beginning of the twenty-first century. The dispute concerned questions of international responsibility for injury caused during the armed conflict and subsequent occupation of parts of the DRC's territory by Uganda, which Uganda had undertaken in response to cross-border actions against it carried out by non-state armed groups based on the DRC's territory. In 2005, the Court had found that Uganda was internationally responsible for injury caused to the DRC as a result of the conflict and the occupation and that the former had an obligation to pay compensation to the latter for that injury.<sup>1</sup> Uganda was found to be responsible for, *inter alia*, wanton destruction of property, exploitation of natural resources, and personal injury

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<sup>1</sup> *Armed Activities on the Territory of the Congo (Dem Rep. Congo v. Uganda)*, Merits, Judgment, 2005 ICJ Rep. 168 (Dec. 19).

and death. The Court also found that the DRC was responsible for breaches of the 1961 Vienna Convention on Diplomatic Relations, broadly relating to the DRC's inability to adequately protect Ugandan diplomatic personnel. In its 2005 judgment, the Court did not decide the amount of compensation due by Uganda to the DRC. Instead, the ICJ sent the parties to the negotiating table, deciding that they had ten years to agree on the amount of compensation due to one another for their respective breaches of international law. Those ten years passed without any agreement being reached, which resulted in the DRC approaching the Court to have it determine the amount of compensation by judicial process.

Unfortunately, the Court has limited capacity to deal with requests for compensation of the kind brought in *Armed Activities*. In my view, the Court faces both legal and factual obstacles in making its determinations on compensation. As to the legal obstacles, the most formidable one appears to be that of substantiating a persuasive analysis of causation between the acts in breach of international law and the injury suffered. In its 2007 judgment in *Bosnian Genocide*, the Court applied a standard under which causation was to be established by ascertaining the existence of a "sufficiently direct and certain causal nexus" between a wrongful act and the injury suffered.<sup>2</sup> Nevertheless, how the existence of this causal nexus is ascertained in practice is a nebulous exercise, which the Court has not so far been able to illuminate. The complexities of *Armed Activities* may have made this case unsuitable to do so, which brings me to the Court's factual obstacles to determining compensation. Putting a "price tag" on a state's injury can be cumbersome. Certain damages are financially assessable, such as the destruction of property of known value. Other damages are more difficult to quantify, including the DRC's claimed macroeconomic damage (i.e., damage to its economy as a whole). In relation to the latter type of damages, the ICJ is unlikely to have the expertise to quantify them. In *Armed Activities*, the Court took the only sensible step: appoint experts. Yet, this step meant that the decision on damages was effectively, if only partially, outsourced to persons having the required expertise which the Court lacked.

A further issue concerns what individuals stood to gain from the ICJ's 2022 judgment. Only certain types of damages claimed by the DRC impacted individuals, such as those relating to personal injury and death. The ICJ awarded a "global sum" for these damages, which does little to acknowledge the individual suffering of those harmed in the conflict. One can say that the ICJ's proceedings are not aimed at acknowledging individuals' positions. I would suggest that this state-centric view, however doctrinally sound, does little to recognize that individuals may be directly impacted by situations over which the Court sits in judgment. Acknowledgement is important, even vital, in situations where human suffering has taken place. I believe that there is no reason for the ICJ to shy away from making decisions which, while aimed at states, also acknowledge individual suffering. A further question concerns how the sum awarded by the ICJ to the DRC might trickle down to the specific individuals harmed in the conflict. I am not aware of any statement made by the DRC that it would distribute the sum to such individuals. One can hope that it will, although it is only in time that one may see their hope fulfilled or disappointed.

### III. MARITIME DELIMITATION

In maritime delimitation, the individual can be taken into account in relation to the so-called "economic factors." I have found that these factors should be labeled more accurately as "access to natural resources," as access to such resources is the issue that may arise in judicial maritime

<sup>2</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. v. Serb.*), Merits, Judgment, 2007 ICJ Rep. 43, para. 462 (Feb. 26); see Vladyslav Lanovoy, *Causation in the Law of State Responsibility*, 90 BRIT. Y.B. INT'L L. (forthcoming 2022) (advance access at <https://academic.oup.com/bybil/advance-article-abstract/doi/10.1093/bybil/brab008/6516063?redirectedFrom=fulltext>).

delimitations.<sup>3</sup> Access to natural resources was the central issue of the earliest disputes on maritime delimitation: the 1909 *Grisbådarna* arbitration stemmed from the contested control over the homonymous lobster banks and the 1969 *North Sea Continental Shelf* cases related to control over hydrocarbon deposits in the North Sea. Access issues were central in the 1984 *Gulf of Maine* case, in which the United States and Canada disputed control over the fisheries around Georges Bank.

Tracing maritime boundaries can determine the flourishing or demise of coastal populations. Boundaries could determine whether fisherfolk who have relied on certain fisheries for their livelihood may continue doing so. If not, it is possible that such populations may have to leave their traditional abodes in search of a more stable livelihood, which is nothing short of internal displacement on economic grounds.

However, maritime delimitation is chiefly based on geographical factors, with consequential, limited relevance of individuals' needs. This state of affairs persists despite states constantly pleading access-related arguments before the ICJ and other international tribunals. Access to natural resources can be a relevant circumstance justifying adjusting a provisional equidistance line at the second stage of the three-stage delimitation process, but an access-based adjustment only took place in one case so far.<sup>4</sup> The delimitation jurisprudence remains state-centric. To ensure greater individual participation, the best, yet radical, option seems the one to change the delimitation process at its root. The question is whether this radical change is realistic in a court, like the ICJ, before which only states may be parties. Perhaps, a softer solution is to allow individual participation in the *procedure* before the Court, for example by encouraging states not simply to submit written evidence of the potential impact of a boundary on fisherfolk, but to invite live witnesses. This suggestion connected to the earlier point on "acknowledgement" of individual harm in compensation cases. Although the ICJ may remain a state-to-state forum, no reason of principle prevents the Court from making individuals more active participants in the *procedure* before it. In twenty-first century international law, this more active participation seems not only feasible, but, quite possibly, desirable.

<sup>3</sup> MASSIMO LANDO, *MARITIME DELIMITATION AS A JUDICIAL PROCESS 195–201* (2019).

<sup>4</sup> *Maritime Delimitation Between Greenland and Jan Mayen (Den. v. Nor.)*, Judgment, 1993 ICJ Rep. 38, paras. 75–76 (June 14).