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Case note: The International Court of Justice's 2022 reparations judgment in *DRC v. Uganda*

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Abstract

This case note examines the International Court of Justice's (ICJ) 2022 reparations judgment in Democratic Republic of the Congo v. Uganda*, analyzing the Court's legal reasoning, its evidentiary approach, and the implications for future reparations cases. The 2022 judgment follows the ICJ's 2005 ruling that found Uganda responsible for violations of international law during its military intervention in the Democratic Republic of the Congo (DRC). Given the failure of negotiations between the parties, the ICJ determined the amount of reparations owed, awarding a global sum of $325 million – substantially lower than the DRC's claim. The case addresses complex legal and evidentiary questions, including the causal link between Uganda's wrongful acts and the damages claimed, the standard and burden of proof for reparations, and categorizing harm. The Court examined four heads of damage, which were damage to persons, damage to property, damage to natural resources and macroeconomic damage, dismissing the latter due to insufficient proof of causation. A key aspect of the judgment was the*

ICJ's adoption of a global sum approach – an uncommon approach in the Court's practice. This case note assesses the lack of clear reasoning and methodology for determining the exact amount awarded for each head of damage.

Additionally, the ICJ's over-reliance on United Nations reports and its application of standards of proof raise concerns about consistency and clarity in reparations proceedings. This case sets a precedent for State responsibility in mass violations of international law but highlights challenges in quantifying harm and ensuring equitable reparations. The Court's reasoning and methods in the case may influence future cases involving State responsibility, armed conflicts, and reparative justice under international law.

Keywords: International Court of Justice, reparations, Democratic Republic of the Congo, armed conflict, global sum

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Introduction

In February 2022, the International Court of Justice (ICJ) rendered its second judgment in the *Armed Activities on the Territory of the Congo* case (*Democratic Republic of the Congo v. Uganda*), this time on reparations. At the outset, the Court revisited its 2005 judgment wherein it held that Uganda had failed to respect its international law obligations, in particular *jus ad bellum*, international humanitarian law (IHL) and international human rights law. The Court found that Uganda's acts of military intervention in Congo – and, in the province of Ituri, as an Occupying Power – and as a logistic, military and financial supporter of irregular rebel groups failed to respect the international principles of non-intervention, the principle of non-use of force, and ultimately, Uganda's humanitarian law obligations.[1]

In 2005, the ICJ found "that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused",[2] and that, in case of failed negotiations between parties on the question of reparation, the Court would have the power to determine the amount of reparation. Due to the unsuccessful negotiations, in 2015, the Democratic Republic of the Congo (DRC) requested the ICJ to assess the amount of reparation owed by Uganda during the conflict between 1995 and 2003, based on the Court's findings in its 2005 judgment. The Court deliberated on several legal issues, including the causal nexus between the international wrongful acts of Uganda and the damages caused to the DRC, questions of burden of proof, the standard of proof for the reparation stage, the forms of damage subject to reparation, and the scope and the value of reparation for each head of damage. Ultimately, the Court awarded a total of $325 million as a global sum for reparation, a figure that was less than 3% of the DRC's claim of $13,478,122,950.

1 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports 2005*, paras 345, 165, 211.

2 *Ibid.*, para. 345.

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The present reparations case holds significant importance for several reasons. First, issuing a reparation as a global sum is an uncommon practice of the ICJ, and one which might be preparing for a "brave new world"[3] where the Court could render a global sum for several heads of damage. Moreover, the Court dedicated substantial attention to the question of evidentiary procedures and the standard of proof for reparations. This case note summarizes and analyzes the main findings of the reparations case.

Different heads of damage

The DRC classified its claims for damages into four distinct heads: damage to persons, damage to property, damage to natural resources and macroeconomic damage. Each category was further delineated into subcategories. The ICJ has been at pains to identify the scope of reparations and the value of each head.

In addressing the first and second types of damage concerning harm to individuals and property, the ICJ encountered challenges in quantifying the exact damage that occurred. However, the Court was better positioned in the context of natural resource damages, enriched with evidence and methodology in its efforts to reach an estimated scope and value of the damage. Additionally, the Court successfully determined the existence of a causal link between the damages to natural resources and Uganda's actions, thanks to the court-appointed expert's report.[4]

Concerning the fourth head of damage, the ICJ held that the DRC did not sufficiently demonstrate a direct causal nexus between the claimed macroeconomic damage and the wrongful acts of Uganda. As a result, the Court did not conduct an inquiry into whether macroeconomic damages are compensable under international law. Thus, the Court dismissed the DRC's claim for reparation for such alleged damage.[5] Nevertheless, it could be argued that the macroeconomic damages resulting from armed conflicts should be compensated, considering the profound impact of war on the economy, in line with the principle of full reparation established in the *Factory at Chorzów* case, as noted by Judge Robinson.[6]

The DRC, finally, requested three forms of satisfaction: the initiation of a criminal investigation against the Uganda Peoples' Defence Forces (UPDF) officers and soldiers accused of war crimes, payment for moral damage, and payment for the cost of the reconciliation between the Hema and Lendu (two ethnic groups in Congo

3 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Separate Opinion of Judge Robinson, *ICJ Reports 2022*, para. 4. Judge Robinson's referring to the global sum as a "brave new world" can be interpreted further to mean that the Court is navigating through mysterious territory and is taking an undefined approach that would not be the mainstay of the Court's jurisprudence.

4 Michael Nest, "Report 4: Exploitation of Natural Resources", in ICJ, *Experts Report on Reparations for the International Court of Justice*, 19 December 2020, p. 70, available at: www.icj-cij.org/sites/default/files/case-related/116/116-20201219-OTH-01-00-EN.pdf (all internet references were accessed in February 2025).

5 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, 9 February 2022, *ICJ Reports 2022*, para. 384.

6 ICJ, Separate Opinion of Judge Robinson, above note 3, para. 45.

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that had ethnic conflicts in Ituri province).[7] For the first form, the ICJ was convinced that international law obligations require Uganda to investigate and prosecute the perpetrators of crimes, and thus there was no need for such an order by the Court.[8] The Court considered that damages were incorporated into the global sum issued for the other two requests.[9]

The Court also rejected the DRC's request for pre-judgment interest. The Court affirmed that the global sum had already taken into consideration the passage of time and that the post-judgment interest was enough. However, as Judge Tomka argued, the global sum did not consider the passage of time as the post-judgment interest of 6% was insufficient to maintain the compensation's real value due to inflation.[10]

The Court also rejected the DRC's request to reimburse litigation costs, following the general rule that each party should cover its own costs. The Court did not consider the circumstances and refused to even receive a statement of costs based on the exception of Article 64 of the ICJ Statute.[11] According to Judge Tomka, however, the DRC's suffering of five years of unlawful use of force and a long period of active litigation before the Court could offer circumstances in favour of reimbursing the costs.[12]

Global sum: A "brave new world" or an unfair old world?

According to Judge Tomka, "[t]he courts are usually powerless to stop wars" and can only offer *ex post* legal consequences, one of those consequences being reparation.[13] In the *Armed Activities* case, the ICJ stated that reparation in the form of a global sum is an exceptional order. The Court cited the case of the Eritrea-Ethiopia Claims Commission (EECC) for the situations that might require global sums, such as "when compensation has been granted in cases involving a large group of victims who have serious injury in situations of armed conflicts",[14] and when there is undoubted evidence of international wrongful acts without the ability to specify an exact value of damages.[15] The Court was "convinced that it should proceed in this [the global sum] manner in the present case",[16] and stated that the global sum value

7 ICJ, *Armed Activities*, above note 5, para. 385.

8 *Ibid.*, para. 390.

9 *Ibid.*, paras 391, 392.

10 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Declaration of Judge Tomka, *ICJ Reports 2022*, para. 10.

11 Statute of the International Court of Justice, 33 UNTS 993, 26 June 1945 (entered into force 24 October 1945) (ICJ Statute), Art. 64: "Unless otherwise decided by the Court, each party shall bear its own costs."

12 ICJ, Declaration of Judge Tomka, above note 10, para. 11.

13 *Ibid.*, para. 1.

14 ICJ, *Armed Activities*, above note 5, para. 107.

15 *Ibid.*, paras 106, 107.

16 *Ibid.*, para. 108.

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would be reduced due to the less rigorous standard of proof applied.[17] The Court stressed that it

> *may*, on an exceptional basis, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations. Such an approach may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury but does not allow a precise evaluation of the extent or scale of such injury.[18]

Issuing a reparation in the form of a global sum is unprecedented in the practice of the ICJ. The *Armed Activities* judgment lacks reasoning on two levels: first, the reasoning for rendering a global sum as a form of reparation in the first place, and second, the lack of a clear methodology for valuing the global sum for each head of damage (especially the first two heads). Accordingly, the judgment contradicts one of the Court's basic principles, which is to issue reasoned judgments pursuant to Article 56 of the ICJ Statute.[19] How the Court reached its conclusions should be clearly defined for the judgment's reader; therefore, a lack of clear reasoning risks the authority and the legality of the judgment.[20]

The ICJ outlined that it would take "equitable considerations" into account when evaluating the global sum award. However, there is a difference between taking equitable considerations into account, as the Court did in the present case, and issuing compensation based on equitable considerations.[21] In the *Diallo* case, although Guinea did not present sufficient evidence for damage to personal property, the ICJ issued compensation for property damage based on equitable considerations.[22]

The ICJ's reasoning is also not supported by relevant international tribunals' practice. Indeed, the Court stated that it relied on the practice of the EECC to justify issuing reparation in the form of a global sum.[23] However, it is misleading to say that the Court applied the global sum approach based on what EECC did.[24] It is correct that the EECC used the term "total monetary compensation" for the entire compensation awarded to Eritrea for all heads of damage,[25] and the term "total compensation" for compensation awarded for the destruction of buildings.[26] While the EECC rendered a specific amount of compensation for each head of damage and each subcategory separately, the ICJ awarded a global sum without specifying the

17 *Ibid.*, para. 106.

18 *Ibid.*, para. 106.

19 ICJ Statute, above note 11, Art. 56(1): "The judgment shall state the reasons on which it is based."

20 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Separate Opinion of Judge Yusuf, *ICJ Reports 2022*, para. 28.

21 ICJ, Separate Opinion of Judge Robinson, above note 3, para. 39.

22 ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, *ICJ Reports 2012*, para. 33.

23 ICJ, *Armed Activities*, above note 5, para. 107.

24 ICJ, Separate Opinion of Judge Robinson, above note 3, para. 5.

25 EECC, *Final Award: Eritrea's Damages Claims*, Vol. 26, 17 August 2009, p. 630.

26 See *ibid.*, paras 122, 128, 139, 194.

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amount for each category. For example, the Court granted a single global sum of $225 million for damage to persons without clarifying the exact amount for each subcategory of loss of life, personal injury, displacement, sexual violence and child recruitment.

ICJ judges, in their separate opinions, disagreed about the appropriateness of the amount of reparation awarded by the Court. Judge Yusuf, for example, confirmed that the amount of reparation awarded by the Court was reasonable based on the evidence provided by the applicant.[27] Yet other judges, such as Judge Tomka and Judge Daudet, argued that the reparation amount awarded was inappropriate for five years of unlawful use of force by Uganda, and does not reflect the real number of injuries and damages caused to Congolese civilians and property.[28]

Furthermore, it is hard to know what methodology was used by the ICJ to reach any global sum for each head, because sometimes the Court failed to indicate an estimated number for the damage and issued only a vague global sum.[29] In the case of personal damage, for example, the Court estimated that there were around 10,000–15,000 victims, but it was not convinced by the value of each personal death based on the practice of the Congolese courts. After reviewing other forms of damage to persons, the Court issued a "single global sum" of $225 million for loss of life and other damages caused to persons.

The ICJ had previously followed an "overall valuation approach" for different heads of damage in the case of compensation for the impairment or loss of environmental goods and services. The reason for this total evaluation is that the ecosystem is made up of elements that are intricately interlinked.[30] However, the Court's transboundary approach to damage to persons, which implicates the right to life and equalizes the different types of harm for human beings, is problematic. As indicated by Judge Robinson,

> [e]ach category of injury is unique, having its own peculiar characteristics, warranting individual treatment by the Court in its award of compensation. The uniqueness and peculiarity of each category of injury are lost in the award of a global sum for all five categories.[31]

Arguably, the Court has hindered the distribution of individual compensations for victims and their families. Moreover, the Court has followed the current State-centric approach to reparation, while there has been widespread theoretical support

27 See ICJ, Separate Opinion of Judge Yusuf, above note 20, para. 1.

28 See ICJ, Declaration of Judge Tomka, above note 10, para. 7. See also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Judgment, Dissenting Opinion of Judge *ad hoc* Daudet, *ICJ Reports 2022*.

29 See, for example, ICJ, *Armed Activities*, above note 5, paras 179, 190, 363, 364.

30 ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, *ICJ Reports 2018*, para. 80.

31 ICJ, Separate Opinion of Judge Robinson, above note 3, para. 16.

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for States' obligation to comply with individual rights to reparation caused by IHL violations.[32]

Evidence

As a general rule of evidence, "the party putting forth a claim is required to establish the requisite elements of law and fact".[33] The ICJ's judgment in *Armed Activities* gives the impression that the Congolese government did not invest sufficient resources and efforts into producing satisfactory evidence. It could be argued that the claimant State could have provided the Court with higher-probative-value evidence through fact-finding commissions, eyewitness testimonies and identification forms rather than relying on non-governmental organization (NGO) reports or scientific studies. The Court acknowledged the difficulty of collecting evidence in war zones and the DRC's inability to obtain sufficient evidence from a territory where it had lost effective control.[34] However, the Court mentioned that, realistically, the DRC, since the 2005 proceedings, should have been able to prepare and collect more evidence for the Court to rely on.[35] The Court was also expecting more evidence from the DRC regarding public property facilities which the government has control over or close relationships with.[36] Judge Yusuf noted: "It is of course regrettable that the Applicant did not present sufficient evidence that would enable the Court to come to clear conclusions with respect to the damage caused by Uganda's wrongful conduct, and the valuation of that damage."[37]

At the same time, it could be argued that the Court could have benefited more from the evidence presented at its disposal or could have used its evidence-collecting power to request parties to produce certain documents,[38] hear witnesses (on its initiative or per the parties' request),[39] conduct on-site inspections[40] and empower third parties to carry out fact-finding inquiries.[41] The Court only used its power of court-appointed experts, and even then, they were only used as a main source of evidence when considering damage to natural resources. The Court did not consider that the DRC is a developing country with insufficient resources and expertise to conduct sufficient investigations.

32 See Steven van de Put and Magdalena Pacholska, "Beyond Retribution: Individual Reparations for IHL Violations as Peace Facilitators", *International Review of the Red Cross*, Vol. 106, No. 927, 2024.

33 Eduardo Valencia-Ospina, "Evidence before the International Court of Justice", *International Law FORUM du Droit International*, Vol. 1, 1999, p. 203.

34 ICJ, *Armed Activities*, above note 5, paras 157–158.

35 *Ibid.*, para. 159.

36 *Ibid.*, paras 255–256.

37 ICJ, Separate Opinion of Judge Yusuf, above note 20, para. 2.

38 ICJ Statute, above note 11, Art, 49.

39 *Ibid.*, Art. 51; Simone Halink, "All Things Considered: How the International Court of Justice Delegated Its Fact-Assessment to the United Nations in the Armed Activities Case", *NYU Journal of International Law and Politics*, Vol. 40, Special Issue, 2008, p. 18.

40 ICJ Statute, above note 11, Art. 44.

41 *Ibid.*, Art. 50; S. Halink, above note 39, p. 18.

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Burden of proof

In *Armed Activities*, the ICJ distinguished between the responsibility of Uganda as an Occupying Power in Ituri and as a supporting actor for other armed groups in other areas of the DRC. With regard to Ituri, the default presumption is that the Occupying Power, in this case Uganda, is responsible for all injuries and damages committed within the occupied territory, even those committed by third parties. This remains the case unless the Occupying Power can prove otherwise – i.e., that the wrongful act was not caused by its failure to comply with the duty of vigilance under Article 43 of the Hague Regulations.[42]

Outside Ituri, Uganda could not always be held responsible for wrongful actions since it was not an Occupying Power and was not in control of the rebel groups.[43] Thus, the ICJ assessed each "category" of damage on a case-by-case basis, considering whether "Uganda's support of the relevant rebel group was a sufficiently direct and certain cause of the injury".[44] In the application of this general rule, the Court was unable to determine the responsibility of Uganda for damage caused by rebel groups in areas other than Ituri,[45] except for the case of child recruitment, where the Court found that Uganda was "backing" rebel groups.[46]

Judge Yusuf considered this approach as a "radical reversal of the burden of proof upon the Respondent". To meet the burden of proof, Uganda was required to prove a double negative: it needed to show that the injury in the occupied territory was not "caused" by its "failure" to comply with the duty of vigilance.[47] The ICJ justified this approach by referring to two cases, namely *Corfu Channel* and *Ahmadou Sadio Diallo*,[48] but according to Judge Yusuf, the judgment under scrutiny marks a significant departure from the Court's case law toward the burden of proof. In the *Corfu Channel* case, the Court stated that it may have "a more liberal recourse to inferences of fact and circumstantial evidence" in cases where the claiming State "has lost effective control over the territory where crucial evidence is located on account of the belligerent occupation of its territory by another State".[49] In that same case, however, the Court also affirmed that losing effective control over territory "neither involves prima facie responsibility nor shifts the burden of proof".[50] Similarly, in *Diallo*, the Court granted compensation for moral (non-material) and personal harms based on the evidence presented by the applicant rather than shifting the

42 ICJ, *Armed Activities*, above note 5, paras 78–79.
43 *Ibid.*, paras 81–83.
44 *Ibid.*, para. 84.
45 See, for example, *ibid.*, para. 250.
46 *Ibid.*, para. 204.
47 ICJ, Separate Opinion of Judge Yusuf, above note 20, paras 6, 8, 15.
48 ICJ, *Armed Activities*, above note 5, paras 116, 117, 120.
49 ICJ, *Corfu Channel (United Kingdom v. Albania)*, Judgment, *ICJ Reports 1949*, para. 18, cited in ICJ, *Armed Activities*, above note 5, para. 120.
50 ICJ, *Corfu Channel*, above note 49, para. 18.

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burden of proof.[51] Judge Yusuf suggests that the burden should be balanced between the applicant and the respondent: the DRC should bear the burden of proving the extent of injury that occurred in Ituri, whereas Uganda should bear a positive burden of proving that it took adequate measures to prevent the injury.[52]

Standard of proof

Due to the silence of the ICJ Statute and Rules, it is in the Court's discretion to articulate standards of proof.[53] The Court's jurisprudence invokes "a sliding scale of standards of proof" depending on the dispute's context and nature.[54] The Court requires a high standard of proof during the liability stage to establish the existence of international violations (merits). Nevertheless, in *Armed Activities*, taking into account the context of the conflict, the long period of the conflict and the mass violations, the Court affirmed the adoption of a less rigorous standard of proof for the sake of damage quantification.[55] As is its usual practice, the Court was silent on what the lower standard of proof should be. The jurisprudence of the Court does not provide or distinguish a consistent approach to the rules of evidence.[56]

The Court did not apply a lower standard of possible probabilities in all cases; instead, it applied the convincing standard for some evidence.[57] This is a high standard of proof for a reparations case.[58] For instance, the Court found itself "unconvinced" of evidence submitted by the DRC in cases of damage to private dwellings,[59] and the coltan and timber exploitation.[60] Yet, the Court previously held in *Costa Rica v. Nicaragua* that environmental damage, as a form of harm, is amenable to reparation under international law.[61] The Court refused to award reparations for environmental damages due to the lack of evidence for harming biodiversity by deforestation.[62] The Court has adopted a higher evidentiary threshold

51 It is evident that in some heads of damage, the Court dismissed Guinea's claims of compensation due to lack of evidence, such as in the compensation for the loss of bank accounts and for loss of earnings. See ICJ, *Diallo*, above note 7, paras 34–36, 41–46.

52 ICJ, Separate Opinion of Judge Yusuf, above note 20, para. 21.

53 S. Halink, above note 39, p. 21.

54 Chen Siyuan and Joel Fun Wei Xuan, "Tiered Standards of Proof before the International Court of Justice", *National Law School of India Review*, Vol. 34, No. 1, 2022, p. 120.

55 ICJ, *Armed Activities*, above note 5, para. 124.

56 C. Siyuan and J. F. W. Xuan, above note 54, p. 126.

57 The convincing standard of proof is a high standard set "between the proof beyond reasonable doubt and the preponderance of evidence". It was defined by the Inter-American Human Rights Court when the Court is "capable of establishing the truth of the allegations in a convincing manner". Cited in Giulio Alvaro Cortesi, "The Standard of Proof", in Giulio Alvaro Cortesi, *Proof and the Burden of Proof in International Investment Law*, European Yearbook of International Economic Law Series, Springer, Cham, 2022.

58 See ICJ, Separate Opinion of Judge Robinson, above note 3, paras 41–43. See also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, Declaration of Judge Salam, *ICJ Reports 2022*, para. 12.

59 ICJ, *Armed Activities*, above note 5, paras 243, 248.

60 *Ibid.*, para. 319, 340.

61 ICJ, *Nicaragua*, above note 30, para. 42.

62 *Ibid.*, para. 350.

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for mass structural damages to the environment and economy.[63] While the Court has previously adopted a lower standard of proof for cases concerning the environment, the standard of proof required to demonstrate environmental harm is still undefined, making it difficult to determine whether compensation will be provided in a given case.

Both the EECC and the ICJ affirmed the adoption of a less rigorous standard of proof for the reparations stage.[64] Similarly, both Eritrea and the DRC are developing and poor countries that faced the same challenge of providing high-quality evidence, and both submitted evidence of a similar quality.[65] Yet the EECC, unlike the ICJ, was able to reach a separate compensation amount for each head of damage. For example, with regard to rape claims, the EECC was unable to reach an estimated number of victims due to the lack of evidence and cultural sensitivity; consequently, the Commission awarded a separate compensation for rape damages that was even higher than the amount sought by Eritrea.[66] In the DRC's injured persons and rape claims, the ICJ held that "it is impossible to determine, even approximately", the number of persons injured or incidents of rape that took place due to the lack of evidence in the United Nations (UN) reports and the evidence presented by the DRC.[67] Similarly, for child recruitment, the Court faced challenges in determining precise figures based on the available evidence.[68] The DRC claimed 2,500 child soldiers, while the UN Organization Mission in the Democratic Republic of the Congo (MONUC) reported 600, the UN Mapping Report recorded at least 30,000, and a witness in the *Lubanga* case before the International Criminal Court (ICC) claimed that 700 children were recruited.[69] However, the ICJ did not specify which number it had taken as a reference for the global sum. It only noted that "the available evidence for the recruitment and deployment of child soldiers provides *a range of the possible number of victims* in relation to whom Uganda owes reparation".[70] Ultimately, the Court did not render a separate amount for physical injuries, rape and child recruitment claims but a single global sum for all damage to persons. Thus, the Court avoided answering highly controversial – and maybe unanswerable – questions of facts, by issuing a global sum.

63 See Jaemin Lee, "International Decisions: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*", *American Journal of International Law*, Vol. 117, No. 1, 2023, pp. 113, 117.

64 EECC, *Eritrea's Damages Claims*, above note 25, para. 36.

65 See ICJ, Separate Opinion of Judge Robinson, above note 3, para. 32.

66 ICJ, *Armed Activities*, above note 5, paras 234–239, mentioned in ICJ, Separate Opinion of Judge Robinson, above note 3, para. 20.

67 ICJ, *Armed Activities*, above note 5, paras 181, 193, mentioned in ICJ, Separate Opinion of Judge Robinson, above note 3.

68 ICJ, *Armed Activities*, above note 5, para. 206.

69 *Ibid.*, paras 200–204.

70 *Ibid.*, para. 206 (emphasis added).

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UN reports

The ICJ referred to the *Croatia v. Serbia* case in its 2005 *Armed Activities* judgment to set the factors for weighting the reports of official or independent bodies,[71] such as the UN bodies. These factors include:

> (1) the source of the item of evidence (for instance, partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).[72]

Due to the insufficient evidence submitted by the DRC, the Court took into account the UN organs' reports, including the 2010 *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003* (Mapping Report) by the Office of the UN High Commissioner for Human Rights. The rationale for this high reliance on the Mapping Report, according to the Court, was that the data included was supported by "at least two independent sources" such as witness interviews (concordant evidence).[73] In addition to the Mapping Report, the Court relied on reports by MONUC, the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, and the inter-agency assessment mission to Kisangani. For example, to estimate the loss of life, reference was made to figures provided in the Mapping Report and the Secretary-General's report on MONUC.[74] Considering these sources, the Court indicated that the report of the court-appointed expert, Mr Urdal, and the UN reports helped to give an estimated numerical range. The Court, while being silent on which source lent greater authority, concluded that the number of deaths for which Uganda owes reparations is between 10,000 and 15,000.[75] (The DRC sought reparations for 180,000 deaths attributed to Uganda.)

It is important to note that the ICJ did not accept the UN reports wholesale; rather, they were used "to the extent that they [were] of probative value and [were] corroborated, if necessary, by other credible sources".[76] In the case of the displaced population, for instance, the Court did not rely on numbers in UN reports that were based on secondary sources or undefined methodologies, because they

71 *Ibid.*, para. 122.

72 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *ICJ Reports 2015*, para. 190.

73 ICJ, *Armed Activities*, above note 5, para. 152.

74 *Ibid.*, paras 152–153.

75 *Ibid.*, para. 162.

76 *Ibid.*, para. 152.

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lacked the necessary credibility.[77] Similarly, the Court could not use the number of deaths stated in the MONUC report since it was not supported by other sources.[78]

It is quite rare to find any head of damage for which the Court did not rely on the UN reports; indeed, they were the top source of evidence for many of Uganda's harmful acts. When the Court could not find any evidence of damage to property in either the DRC submission or the report from the court-appointed expert, UN reports were used, together with corroboration from inter-agency documentation, as the last resort.[79] The UN reports helped give a sense of the extent of the property destruction in many villages.[80] Even when relying substantially on the court-appointed expert's report in the case of natural resources, the Court noted that the UN reports, in addition to the Porter Commission report (a report produced by a quasi-judicial fact-finding commission established by Uganda), "furnished sufficient and convincing evidence".[81] The Court has been criticized for leaning extensively on the work of non-adversarial UN fact-finding bodies, to the extent that Halink has argued that the Court delegated its fact-assessment task to the other UN organs.[82] The UN reports often align with specific political objectives. They are conducted as part of the organization's routine monitoring of human rights and humanitarian law compliance and are primarily used to name and shame violators in order to stop their wrongdoing, rather than to serve the judicial function of the Court.[83] The UN fact-finding missions lack standardized evidence collection and empirical field research processes, hindering the ability to duplicate and validate the conclusions of their reports.[84] However, the Court's power of enabling fact-finding missions by third parties, given by Article 50 of the ICJ Statute, is not so different from relying on the UN reports.[85] The basic problem is not the reliance on the UN reports; rather, it is the preferential treatment given to such reports without a transparent evaluation of their scope, motivation and methodology.[86]

The ICJ had valued the UN reports in previous case law, namely *Bosnia v. Serbia* and *Croatia v. Serbia*.[87] The heavy reliance on the UN reports in two active submissions (at the time of writing, i.e. January 2025) before the Court, namely *South Africa v. Israel* and *Gambia v. Myanmar*, is also notable. In *Armed Activities*,

77 ICJ, *Armed Activities*, above note 5, paras 215–217.

78 *Ibid.*, para. 156.

79 *Ibid.*, paras 246, 252.

80 See, for example, *ibid.*, paras 190, 191, 200, 201, 204, 246.

81 *Ibid.*, para. 279.

82 S. Halink, above note 39, p. 26.

83 Michael Bothe, "Fact-Finding as a Means of Ensuring Respect for International Humanitarian Law", in Wolff Heintschel Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen*, Springer, Berlin, 2007, pp. 249, 259, 264.

84 M. Cherif Bassiouni, "Appraising UN Justice-Related Fact-Finding Missions", *Washington University Journal of Law and Policy*, Vol. 5, 2001, p. 41.

85 See Michael A. Becker, "The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar", *EJIL: Talk!*, 14 December 2019, available at: www.ejiltalk.org/the-challenges-for-the-icj-in-the-reliance-on-un-fact-finding-reports-in-the-case-against-myanmar/.

86 S. Halink, above note 39.

87 ICJ, *Genocide*, above note 72, para. 459.

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the Court maintained its approach to the value of UN reports. Thus, the Court is called to establish a set of advanced assesments to verify the value of UN fact-finding reports.

Courts or quasi-judicial mechanisms

In the 2005 *Armed Activities* judgment, the ICJ gave "special attention" to "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".[88] It is helpful for civil proceedings when there are criminal cases before an international court to support the evidence. In its 2022 *Armed Activities* judgment, the ICJ relied on the ICC's *Katanga, Lubanga* and *Ntaganda* cases on several occasions – for example, with regard to loss of life,[89] to proving the "common practice" act of rape in the conflict,[90] to establishing the number of children recruited based on witness testimony,[91] and to the valuation of damage such as rape,[92] child recruitment[93] and damage to property.[94] The Court also valued the findings of the Porter Commission; it relied on the Commission's report to value the damage and the subsequent reparations, as it did in its 2005 judgment, which gave a probative value to the report.[95] In cases of damage to natural resources, the Court stated that it "attributes probative value" to the Porter Commission report and other reports,[96] "particularly if they are corroborated by the Mapping Report and the expert report by Mr. Nest".[97]

Court-appointed expert reports

The ICJ appointed four experts in *Armed Activities*, based on Article 67 of its Rules;[98] however, it disregarded their reports in most instances, except in the case of natural resources.[99] Thus, the Court dismissed the estimation and the valuation of experts in damage to property evaluation since their methods and discounting factors were "unexplained".[100] It could be claimed that it was disappointing that experts' reports were limited to desk-based research and did not include any field research for fact-finding. The court-appointed expert, Mr Urdal, who based his report on an

88 ICJ, *Armed Activities*, above note 5, para. 61.
89 *Ibid.*, para. 158.
90 *Ibid.*, para. 191.
91 *Ibid.*, para. 202.
92 *Ibid.*, para. 192.
93 *Ibid.*, para. 205.
94 *Ibid.*, para. 249.
95 *Ibid.*, para. 125.
96 See, for example, *ibid.*, paras 295–297, 306, 308, 331.
97 *Ibid.*, para. 280.
98 *Ibid.*, para. 21.
99 See the above subsection on "UN Reports".
100 ICJ, *Armed Activities*, above note 5, para. 248.

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academic database called the Uppsala Conflict Data Program (UCDP), reached an estimated death toll of 14,663 attributable to Uganda throughout the entirety of the DRC.[101] The Court noted that the UCDP evidence was based on public press and secondary data that have limited probative value.[102] On one occasion in the judgment, the Court was convinced by the methodology of its appointed expert, Mr Nest, and explained his approach in detail.[103] The Court awarded reparations for looting, plundering, and exploitation of minerals (gold, diamond, coltan) "within the range of the assessment of the expert report".[104] However, it decided to order a lower value for coffee and timber reparations than Mr Nest's findings since those findings were not corroborated by other sources and his estimate was less accurate.[105]

NGO reports

In its 2022 judgment, the ICJ referred to reports by NGOs such as Human Rights Watch (HRW). For example, the Court took into consideration the numbers mentioned in the HRW report regarding the exploitation of coltan and coffee,[106] but dismissed estimates of the size of the displaced population mentioned in the HRW report since the source was not accurate.[107] Similarly, in *Croatia v. Serbia*, the Court dismissed some information from NGO reports but declared that it could take information contained in such sources into account "whenever it appears to corroborate evidence from other sources".[108]

Scientific studies

It is notable that in the 2022 reparations case, the DRC government submitted a large body of evidence based on scientific studies – for example, the report of the Association for the Development of Applied Research in Social Sciences for loss of life,[109] the 2016 expert report entitled *Evaluation of the Damage Caused to Congolese Fauna by Uganda between 1998 and 2003*, and the 2016 University of Kinshasa study, carried out at the request of the DRC, estimating the war's macroeconomic damages.[110] Uganda commissioned two experts from the University of Oxford to counter the claims included in the Kinshasa study.[111]

The ICJ found, however, that the majority of the scientific studies were not credible as evidence. Regardless of the quality of the research and methodology, these

101 *Ibid.*, para. 149.
102 *Ibid.*, para. 150.
103 *Ibid.*, paras 268–272, 279, 295, 310, 321.
104 *Ibid.*, paras 298, 310, 322.
105 *Ibid.*, paras 332, 344.
106 *Ibid.*, paras 320–331.
107 *Ibid.*, para. 127.
108 ICJ, *Genocide*, above note 72, para. 457.
109 ICJ, *Armed Activities*, above note 5, para. 135.
110 *Ibid.*, para. 372.
111 *Ibid.*, para. 380.

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studies were "not intended to, and do not, identify the number of deaths that have a sufficiently direct and certain causal nexus to the unlawful acts of Uganda".[112] Moreover, the Court did not find that "the methodology used in the [Kinshasa] study [was] sufficiently reliable for an award of reparation in a judicial proceeding."[113] The Court dealt with the evidence prepared specially for the case before it with "caution".[114]

Conclusion

This case note highlights two main weaknesses of the ICJ's 2022 judgment: first, the absence of reasoning for the valuation of a global sum for reparations, and second, the lack of clarity surrounding the evidence weight and the standards of proof. Issuing a global sum for different heads of damage questions the equity of such a conclusion in cases of mass violations of IHL since it ignores the individual rights of victims and survivors.

The ICJ, while spending more time in the present judgment than in previous cases for evidence standards of proof, continues its tradition of "a very open-ended, discretionary evidentiary standard".[115] Unfortunately, the Court does not articulate a clear lower standard of proof that it claims to be following on reparation cases.

The case in hand is fact-intensive and has scientific aspects; thus, the Court relied on different fields rather than law to reach factual determinations.[116] The Court relied heavily on UN reports, thus suggesting that the reports had authoritative value in view of their UN stamp. Less probative value was given to NGO reports and scientific and academic studies as they were considered not relevant or probative to the actual question at hand. The Court also leaned substantially, and without explanation, on the practice of the EECC more than other international or regional courts and tribunals that also dealt with mass human violations (such as International Criminal Tribunals for the former Yugoslavia and Rwanda). However, per the author's assessment, when comparing the awards of the EECC and the Court, the former did better work than the latter.

This case offers lessons for pending and future reparations cases which may be brought before the ICJ. Firstly, claimants should invest more effort into preparing victims' identification forms as thoroughly as possible, and should document international law violations through independent bodies that aim directly and only to provide evidence for the Court. They should also allow access for UN bodies and committees to carry out investigations for the sake of documenting allegations of compensable international law violations. Lastly, and most importantly, claimant States should preserve the basics of the law of State responsibility, building the causation nexus between the specific wrongful act and the alleged violating party. With an

112 *Ibid.*, para. 148.
113 *Ibid.*, para. 380.
114 *Ibid.*, para. 358.
115 S. Halink, above note 39, p. 21.
116 James Gerard Devaney, "A Coherence Framework for Fact-Finding before the International Court of Justice", *Leiden Journal of International Law*, Vol. 36, No. 4, 2023, p. 1074.

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increase in factually complex cases,[117] the ICJ is called upon to provide more guidance for parties on the weight of evidence and standard of proof that they should meet, and to develop a "UN fact-finding standard operating procedure"[118] to evaluate the credibility of UN reports. Furthermore, with the increase in human rights and humanitarian cases on the Court's docket, the Court is called to support individuals' right to reparation for IHL violations.

117 James Gerard Devaney, "Evidence, Fact-Finding and Experts", in Joanna Gomula and Stephan Wittich (eds), *Research Handbook on International Procedural Law*, Edward Elgar, Northampton, MA, 2020.

118 S. Halink, above note 39, p. 37.

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